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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 648

JAMES AVERY, PETITIONER,

vs.

THE STATE OF GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED JULY 28, 1952
CERTIORARI GRANTED MARCH 9, 1953

SUPREME COURT OF THE UNITED STATES

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[fol. 1] **IN SUPERIOR COURT OF WALKER COUNTY, STATE OF GEORGIA**

INDICTMENT—February 21, 1951

GEORGIA,
Walker County:

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, Selected, Chosen and Sworn for the County of Walker, to wit:

1. W. L. Kling, Foreman.
2. A. S. Brown.
3. R. R. Clarkson.
4. James Agnew.
5. E. E. Russell.
6. Judson Marsh.
7. Gordon Ragland.
8. J. O. Leigh.
9. "R. W. Jannings".
10. W. L. Baker.
11. Frank Shaw
12. C. R. McGaha.
13. W. B. Leighridge.
14. Charles R. Thurman.
15. H. B. Lowe.
16. D. C. Headrick.
17. C. L. Crowder.
18. W. B. McGill.
19. Bence C. Smith.
20. Kirby Smith, Sr.
21. D. B. Blaylock.
22. "H. C. Ciuett".
23. G. B. Smith.

SPECIAL PRESENTMENT—February 21, 1951

In the name and behalf of the citizens of Georgia, charge and accuse James Avery of the County and State aforesaid with the offense of FELONY, for that the said James Avery did on the 29th day of October in the year of our Lord Nineteen Hundred and Fifty in the county aforesaid, unlawfully and with force and arms, make an assault upon the person of Mrs. M. L. Hollingsworth, and did strike, beat and wound her, and did have carnal knowledge of and sexual intercourse with said Mrs. W. L. Hollingsworth, a female, forcibly and against her will, contrary to the laws of said State, the good order, peace and dignity thereof.

John W. Davis, Solicitor General. Mrs. M. L. Hollingsworth, Prosecutor.

[fol. 2] SUPERIOR COURT, FEBRUARY TERM, 1951

THE STATE

VS.

—— ——

—— Court, —— Term, 194—. Plea, Not Guilty —— Guilty.

SENTENCE

Whereupon, it is ordered and adjudged by the Court that the Defendant pay a fine of — Dollars and all cost, and that he remain in custody until fine is paid, and in default of payment of said fine within — days from date, that said Defendant be confined at work in the Chain gang of said County on the Public Works, or elsewhere, as the law directs, for and during the full term of — months, to be computed from the time of his reception at said — with the privilege to pay said fine and cost and be discharged at any time after entering any public works.

E. J. Clower, Solicitor General.

This — day of — — 194—.

——, Judge.

[fol. 3] Sub. 2-24-51. Witnesses: Mrs. M. L. Hollingsworth, Stanley Hollingsworth, Joe Adams.

[Endorsed:] No. 4169. Superior Court, Walker County, February Term, 1951. The State vs. James Avery. Felony. (Rape.) Special Presentment. True Bill. W. L. Kling, Foreman. 21 Day of Feb. 1951. ——, Prosecutor. John W. Davis, Solicitor General.

[fol. 4] IN SUPERIOR COURT OF WALKER COUNTY

WAIVER OF ARRAIGNMENT AND PLEA OF NOT GUILTY

The Defendant, James Avery, waives formal arraignment, copy Bill of Indictment, list of witnesses before the Grand Jury, and agrees to strike from a panel of 48 Jurors and pleads not guilty.

Frank M. Gleason, G. P. Shaw, Defendant's Attorney. John W. Davis, Solicitor General.

[fol. 5] IN SUPERIOR COURT OF FULTON COUNTY

CHALLENGE TO ARRAY AND ORDER OVERRULING—Filed September 17, 1951

Now comes the defendant in the above stated cause, and files this, his challenge to the array of traverse jurors, before said panel is placed upon him, and for grounds of challenge to the array shows that the traverse jury put upon him is not, and was not, fairly and properly impaneled, and is an illegal jury and ought not to be put upon him, and as grounds of challenge alleges:

1

That said jurors so put upon him were taken from the jury list of Fulton County, Georgia, from the books of the tax receiver of Fulton County, Georgia, pursuant to the provisions of Georgia Code, section 59-106, which provides:

"Biennially, or, if the judge of the Superior Court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the Board of Jury Commissioners shall revise the jury lists.

"The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the entire number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, [fol. 6] such name shall be returned to the box and another drawn in its stead."

2

That the provisions of the above quoted statute are contrary to and in violation of the provisions of Art. VI, Sec.

XVI, Par. II of the Constitution of Georgia (Code, 2-1502) which provides:

"The General Assembly shall provide by law for the selection of the most experienced, intelligent, and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. The General Assembly shall have the power to require jury service of women also, under such regulations as the General Assembly may prescribe" for the following reasons:

(a) Said statute illegally restricts the selection of upright and intelligent men to property owners.

(b) The language of the above stated statute limits and restricts the operation of the above quoted provisions of the Georgia Constitution, in that it excludes from jury service upright and intelligent persons entitled to serve, under the provisions of the Constitution, whose names do not appear on the tax receiver's digest.

(c) Said statute illegally excludes from the jury commissioners' consideration the names of upright and intelligent men who are not property owners.

(d) Said statute illegally imposes a property ownership qualification as a condition precedent to jury service, when the Constitution of Georgia imposes no such qualification.

(e) Said statute illegally excludes and disqualifies from jury duty, poor and indigent citizens.

(f) Said statute illegally excludes experienced, intelligent and upright men who are property owners and make no return to the tax receiver, and those who from poverty make no return to the tax receiver.

(g) The statute illegally vests in the jury commissioners uncontrolled discretion and power to select jurors from a [fol. 7] special class, who happen to be property owners, to the exclusion of the non-property owner class, when the constitutional provision aforesaid vested in the General Assembly no such power or authority to enact such legislation.

(h) Said statute illegally places the power in the jury commissioners as administrative officers to exclude masses of the citizens from jury duty without defining the power, regulating the act, or in any way controlling the decision of said jury commissioners.

(i) Said statute is vague and indefinite and incapable of enforcement in that it sets up no guide to control the official acts of the jury commissioners, and provides for no hearing or appeal. Said statute does not define an "experienced," "upright," or "intelligent" man or set up any standard by which it could be determined that those selected from a property ownership class possessed any such qualification.

(j) Said statute provides no method or procedure by which defendant could determine whether said commissioners performed their duties in accordance with the Constitution, and selected "intelligent and upright" men in the first instance.

3

For the specific reasons alleged in paragraph 2 hereof, said statute (Code § 59-106) violates Art. I, Sec. I, Par. XXV of the Constitution of Georgia (Code § 2-125), which provides:

"All citizens of the United States, resident in this State, are hereby declared citizens of this State, and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship."

4

For the specific reasons alleged in paragraph 2 hereof, said statute violates Art. I, Sec. I, Par. III of the Constitution of the State of Georgia (Georgia Code 2-103), which provides: "No person shall be deprived of life, liberty, or property, except by due process of law."

[fol. 8]

5

For the specific reasons alleged in paragraph 2 hereof, said statute (59-106) violates section 1 of the Fourteenth Amendment of the Constitution of the United States (Georgia Code, § 1-815), which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and im-

munities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws," and denies the defendant the equal protection of the laws.

6

The General Assembly of Georgia, in an attempt to carry out the provisions of Art. VI, Sec. XVI, Par. II of the Constitution above quoted (Georgia Code, § 2-5102), enacted a law, embodied in Georgia Code, § 59-101, providing:

"There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the Superior Court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor; provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners."

Under the foregoing statute the Judge of the Superior Court is required to appoint six "discreet" persons to such board.

Defendant alleges that while said law (section 59-101) is a constitutional law, it has been applied in an unconstitu- [fol. 9] tional manner by State action as to him because:

(a) Defendant is a Negro.

(b) Defendant stands charged with the rape of a white woman.

(c) Said statute makes no provision for the appointment of a person of color as a jury commissioner, and never in the history of Fulton County, Georgia, has a Negro been appointed to serve as a jury commissioner, and no member of the same race as defendant has ever been given the opportunity to determine the qualifications of the persons whose names appear on the tax receiver's digest from which said jury commissioners are required to select jurors.

(d) The systematic exclusion of citizens of the colored race from the board of jury commissioners solely because of their race and color, is discriminatory and a denial to this defendant of equal protection of law, in violation of the Fourteenth Amendment of the United States Constitution quoted above.

(e) The fact that no Negro has ever been appointed as a jury commissioner in Fulton County, Georgia, is conclusive evidence of systematic exclusion of citizens of the colored race, from duty as jury commissioners, solely because of their race and color.

7

That the proportionate number of Negro traverse jurors to white traverse jurors in the jury box has been excessively small both in comparison with the proportionate number of Negro citizens to white citizens in Fulton County as a whole and in proportion to the comparative number of Negro citizens to white citizens on the tax receiver's digest, and that this fact is the result of a deliberate and systematic exclusion of proportionate numbers of the Negro race from jury service, and that such exclusion denies the defendant due process of law and equal protection of the laws contrary to the above quoted provisions of the State and [fol. 10] Federal Constitutions, in that it fails to afford him a proportionate number of citizens of his own race before whom his cause has an opportunity for trial. The number of white citizens making returns for the digest of the tax receiver of Fulton County for the year 1951 is 105,035, while the number of colored citizens making returns is 17,736. Therefore, the percentage of colored citizens on the tax receiver's digest is 14 per cent of the total. The number of white citizens in the jury box of Fulton County is 20,509. The number of colored citizens in the jury box is 1115, or 5 2/5 percent of the total.

8

The the names of persons of the white and Negro races are placed in the jury box on slips of paper of different colors, the names of the white citizens being placed therein on white slips of paper and the names of the Negro citizens

being placed therein on slips of paper of yellow or some other color.

9

That the proportionate number of Negro persons to white persons actually selected on panels for jury duty is still less, regularly and systematically, that the proportionate number of Negro persons to white persons on the list of traverse jurors as a whole, and that this results from a further deliberate and systematic exclusion of Negroes from jury duty, which is accomplished, in part, at least, by means of observation, by color at the outset, on slips of paper at the time the names of the jurors are drawn from the jury box, referring to persons of the white and Negro races, respectively, and the systematic failure or refusal to draw a proportionate number of persons of the Negro race (or yellow or colored slips of paper), thus further denying the defendant due process of law and equal protection of the laws contrary to the above quoted provisions of the [fol. 11] State and Federal constitutions, in that this discriminatory practice by State action further reduces the proportionate number of citizens of his own race before whom he may have an opportunity for trial.

10

The Clerk of the Superior Court of Fulton County has not complied with the requirements of Section 59-109 of the Georgia Code in that he has not made out in a book lists of names contained in the grand and traverse jury boxes.

On the contrary, said clerk has on file a list of names, printed in a book, on the cover of which is a certificate signed by the jury commissioners, and the Clerk of the Superior Court as Clerk of the Board of Commissioners.

11

The jury commissioners have not complied with the requirements of Section 59-109 of the Code and supplied properly certified "lists" to the Clerk of the Superior Court. The certificate is defective because said certificate does not certify that said "lists" (if the printed names in a bound book cover is the list), contain all the names placed

in the jury box, but only certifies that said commissioners selected 21,624 names for the jury and from that number 2,000 were selected as grand jurors.

Wherefore Defendant prays that the Court inquire into the facts alleged in the foregoing challenge to the array, and that the challenge to the array be sustained, and the panel dismissed.

This 17 day of September, 1951.

Frank M. Gleason, George Paul Shaw, Attorneys for Defendant.

[fol. 12] Proof of Service (omitted in printing)

[File endorsement omitted.]

Order

Upon hearing the evidence offered in support of the within challenge to the array, it is ordered that said challenge to the array, be, and the same is hereby overruled.

September 17, 1951.

Claude D. Shaw, J. S. C. A. C.

[fol. 13] In Superior Court of Fulton County

[Title omitted]

Amendment to Defendant's Challenge to the Array and Allowance Thereof—Filed September 17, 1951

Now comes the defendant in the above entitled cause and with leave of the court first had and files this his amendment to his challenge to the array of the jurors put upon him in said cause by adding thereto the following paragraph:

That no legal and official lists of the petit jurors of Fulton County, Georgia, is kept or maintained by the Clerk of the Superior Court of Fulton County, Georgia, and that by reason of such failure the defendant is deprived of his

rights to examine and inquire into the manner and way and the legality of the manner in which the jurors put upon him in this case were selected for the reason that there is no legal, official, certified lists of the names of the jurors from which the jurors put upon him were selected to which he may refer for the purpose of determining whether the jurors put upon him have been legally selected for jury duty in the Superior Court of Fulton County, Georgia.

Wherefore, defendant prays that this his amendment be allowed.

Greason & Painter, Shaw & Shaw, by Geo. P. Shaw,
Deft's Attorneys.

Amendment allowed this 17th day of September, 1951, subject to the right of the State to demur thereto.

Claude D. Shaw, J.S.C.F.C.

[File endorsement omitted.]

[fol. 14] In Superior Court of Fulton County

[Title omitted]

Demurrer—Filed September 17, 1951

Comes now the State of Georgia and files this demurrer to and motion to strike the challenge to the array of traverse jurors in the above-styled case and respectfully avers:

(1)

The State of Georgia demurs generally and moves to strike said challenge to the array of traverse jurors on the ground that the allegations set forth therein are insufficient in law to constitute a valid challenge to the array of traverse jurors.

(2)

The State of Georgia further demurs generally to and moves to strike said challenge to the array of traverse jurors on the additional ground that upon the allegations set forth therein the defendant, James Avery, is not en-

titled under the law, the Constitution of the State of Georgia, or the Constitution of the United States to the relief for which he prays.

(3)

The State of Georgia further demurs generally to and moves to strike said challenge to the array of traverse jurors on the additional ground that the allegations set forth therein disclose that all the requirements of the law and Constitution of the State of Georgia, as well as the Constitution of the United States, have been fully complied with, and that no rights to which the defendant is entitled under the laws and Constitution of the State of Georgia, as well as the Constitution of the United States, have been violated.

(4)

The State of Georgia further demurs generally to and moves to strike said challenge to the array of traverse [fol. 15] jurors on the additional ground that it affirmatively appears from the allegations thereof, together with facts of which this court is bound to take judicial cognizance, that none of the accused's legal and constitutional rights have been violated in the impanelling of the traverse jury put upon accused in this case.

Wherefore, it is prayed that this demurrer be sustained, and that said challenge to the array of traverse jurors be stricken.

Paul Webb, Solicitor General. John W. Davis, Carl Copeland, Counsel for the State of Georgia.

[File endorsement omitted.]

[fol. 16] In Superior Court of Fulton County

[Title omitted]

Traverse to the Challenge to the Array of Traverse Jurors—Filed September 17, 1951

Comes now the State of Georgia and, without waiving its demurrer and motion to strike previously filed, files this

traverse to the challenge to the array of traverse jurors in the above-styled case and avers:

(1)

Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of said challenge to the array of traverse jurors are untrue and are denied.

For further and affirmative traverse of said challenge to the array of traverse jurors, the State of Georgia avers that none of the rights of the defendant, James Avery, under the laws and Constitution of the State of Georgia, as well as the Constitution of the United States, have been violated.

(2)

That there has been no discrimination whatever against this defendant and he has been accorded fair, equal, legal, and constitutional treatment by all of the officers and courts of the State of Georgia who have dealt with him in this case.

(3)

That the traverse jury put upon the defendant in this case has been impanelled in strict compliance with all of the laws and provisions of the Constitution of the State of Georgia, as well as all of the requirements of the Constitution of the United States, as construed by the appellate courts, including the Supreme Court of the United States itself.

Wherefore, it is prayed that this traverse be sustained and that said challenge to the array of traverse jurors be [fol. 17] stricken.

Paul Webb, Solicitor General. John W. Davis, Carl Copeland, Counsel for the State of Georgia.

Duly sworn to by Carl Copeland. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 18] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

ORDER SUSTAINING GENERAL DEMURRERS AND MOTION TO STRIKE—September 17, 1951

The general demurrers to and motion to strike the defendant's challenge to the array of traverse jurors in the above-styled case coming on to be heard, after consideration thereof and argument of counsel:

It is considered, ordered and adjudged that said general demurrers and motion to strike are sustained as to paragraphs 1, 2, 3, 4, 5, and 6 of said challenge to the array of traverse jurors, and paragraphs 1 to 6, both inclusive, are hereby stricken.

It is further considered, ordered and adjudged, that said general demurrers and motion to strike said challenge to the array of traverse jurors be, and the same are, hereby overruled as to paragraphs 7, 8, 9, 10, and 11 thereof.

This the 17th day of September, 1951.

Claude D. Shaw, Judge Superior Court, A. J. C.

[fol. 19] IN SUPERIOR COURT OF FULTON COUNTY

TRANSCRIPT OF TESTIMONY

Mr. George A. Campbell, being first duly sworn as a witness for the defendant, testified as follows:

Direct Examination by Mr. Gleason

My name is George A. Campbell. I am not now a member of the Board of Jury Commissioners of Fulton County. I was through 1948. My term expired, well I guess, in September, 1948. No, I am not sure about the date. The photostatic copy of a certificate sworn to in 1949 appears to bear my signature. It is dated in 1948, but sworn to in 1949 and that is when I finished up. We finished up the list in 1949. As to how we went about selecting members to serve on the grand and traverse jury in Fulton County, we have a tax digest, we take the names from it, from the

tax digest and try as best we can to find out who is eligible for jury duty and pick the ones we think are best suited for the job. We have several ways of determining whether or not a man is eligible. One of them is the City Directory to find out his occupation, to see if he has got a telephone and out of the six commissioners that are pretty well scattered about seven out of ten names called some commissioner would be acquainted, if not personally, in a general way, with the name. No, I do not mean that he would be familiar with the information he had procured from a combination of the City Directory and telephone book and the like. I mean some one of the commissioners would probably know this man, or know him by reputation, the community he lives in, his neighbors and all like that. As a part of it I take the statement of the member of the jury commissioners who might possibly know the man's reputation in the community in which he lives and the rest of the Board determine from that that he is an upright and intelligent man. The other part of it is, well, a discussion from his occupation, his place of residence and from his general reputation. As to what his place of residence would have to do with his reputation of his worth as an upright and intelligent man, well, it would have a great deal. If you lived [fol. 20] down here on Central Avenue; nine times out of ten you would not be eligible for jury duty. Central Avenue is a street. As to what living on Central Avenue would have to do with his eligibility with respect to being an upright and intelligent man, well, it is a section where nearly everybody lives in rented rooms, a very poor class of people and a big amount of our crime originates right down there in that section. As to how sizable a population, I would say, in this county, that live in that section, well, I wouldn't say. In the first place, there are very few of those people's names would be on the tax digest. Very few of those poor people's names would be on the tax digest.

Question: Now, Mr. Campbell, who on the Board of Jury Commissioners decided to make yellow slips for the colored people who are placed in the jury box and white slips for the white people who are placed in the box?

Answer: None of them.

Question: Why did your Commission do that?

Answer: It has been the custom for fifty years or more

to do that and we agreed that would be a big advantage in locating these people from the lists that they are on, if we knew whether or not they were white or colored.

What we did was to follow a procedure that had been adopted for fully fifty years.

Question: And because the jury commissioners of Fulton County fifty years ago typed the names or printed the names of the negroes on yellow tickets before they put them in the box your Board simply carries through on that practice, is that true?

Answer: I wouldn't say that was the reason.

Question: I say is that fact true?

Answer: No, sir.

In explaination as to wherein that is not true, we don't know that far back except from hearsay, but we know that we take the digest which is separate and has yellow sheets [fol. 21] and make the cards for the jury box in the same color as in the tax digest, and one reason for that is that it has been the custom to do that over the years.

Question: (By the Court) I understand you to say for the convenience of locating them?

Answer: That is true. I say we thought further that it would be better to have it that way. As to whether that was the reason for doing it fifty years ago, for the convenience of locating them, I didn't do it fifty years ago. While I am testifying as to the practice and custom and not familiar with why they did it fifty years ago, they might have had a different idea then. The Board of jury commissioners on which I served before my term expired first determined to print the names of negroes in the box on yellow paper so they could be located more easily when we started work. The minutes do not reflect any official action of the Board because we didn't keep minutes. No, I have had no discussions as former chairman of the Board of Commissioners with any member of the Solicitor-General's office respecting my reason for making these tickets yellow.

Question: Now if you have in mind that making the tickets yellow would more easily locate a person, explain why you don't make them all yellow?

Answer: Well, the white people are made on the white tickets and if you make them all just alike you have no way.

of discriminating, or rather deciding which is white and which is colored.

Question: Well, did your Board take that into consideration in drawing a jury, who was white and who was colored?

Answer: No, sir.

As to why you needed to have that information, you need to have it so you can find the people, where the Sheriff's office can find people when they go out to look for them.

Question: Did you have any complaints from the Sheriff's [fol. 22] office that he could not find the people and request that you put the white on white and the negroes on yellow slips?

Answer: We never did put them all on white, couldn't have had any complaints from them because they were all yellow and white. I have heard the bailiff in the Sheriff's office make the complaint that he was having difficulty in locating the citizens who might have been drawn for jury service.

Question: And did you do anything different than had been the practice for the past fifty years to help him locate that man?

Answer: We put all the information on there that we could find.

Question: Well, you didn't have to have a yellow sheet to do that, did you?

Answer: No, we decided that we had better put them on yellow sheets and put the white on white sheets. As to whether I said that the decision to put them on yellow was made because it had been the practice for fifty years, I didn't say we did that on that account.

I would say that it was partly true that we adopted the system of putting the negroes on a yellow ticket because it had been the practice of the commissioners to do it for more than fifty years and for the further reason that it helped the sheriff in summoning, to have the race on a piece of paper.

Question: Now, what else is it to it that influenced your judgment?

Answer: Well, we just thought it was better to have it that way. As to whether or not I have any facts that caused me to come to that conclusion except the facts that you have just asked me about, it is just general experience.

Question: Now, let's go into the general experience, let's have your full views about that, please. What did your general experience have to do with the placing of names on yellow paper?

[fol. 23] Answer: The experience that if you knew whether a man was colored or white when you went looking for him, it was much easier to eliminate him on account of his color and look him up where he lived.

As to how many we eliminated because of their color, we didn't eliminate anybody because of their color, those on yellow slips we put on the jury lists. As a jury commissioner and our authority to put anyone on the jury list, well, that was our job to make up the jury lists. No, it wasn't our job to select from the tax digest the names of upright and intelligent people, put their names on a ticket and put it in the box. We first made up a list and then we decided from that list which one would be grand jurors and then we cut them up and divided them and put the white on white cards and the colored on colored cards, but we did not eliminate anybody on account of color. As to what stage in our procedure that we used the yellow list, well we started first, I wouldn't swear this, but I think we started on the colored list first, went over that list and took the ones we thought were eligible for jury duty. We took the yellow sheets from the tax digest and we first wrote the names down on white sheets, then when we made the cards for the jury box we put them on colored cards. In addition to putting the man's name from the tax digest on the card or on the sheet, we put his address and we got that from the tax digest, usually. Sometimes it might have been left off, but I could not say that was a constant practice, but I would say, as a general practice, we found most of the addresses on the tax digest.

Question: And if you had that information and the address was on there and his name was on that part of the tax digest that is required by the Constitution to be yellow, why didn't you just put his name on a white piece of paper with the white folks and put it in the box?

Answer: For the same reason I just explained to you. When the cards are turned over to the sheriff's office, if he [fol. 24] didn't have yellow cards and white cards, he wouldn't know whether they were white or black. As to

what my duties as a member of the Board of Commissioners had to do with turning over cards to the sheriff's office, well, I didn't turn them over.

Question: What concern was it of your Board of Commissioners whether or not the sheriff's office was going to have any difficulty in locating a man?

Answer: Because I heard them complain of it.

Question: You heard them complain?

Answer: Yes.

Question: So you merely wanted to be helpful to the sheriff.

Answer: Sure. You are showing me what purports to be a book of grand jurors and petit jurors with a number of names printed in there and their addresses and with a certificate apparently bearing my signature. With respect to this book and as to whether I have ever seen it before, No, sir, I have not. I do not know where it came from. They had it printed I presume. I couldn't tell.

Question: You say you have never seen it before?

Answer: Not that particular book.

Question: Then if you have never seen the book before, you as chairman of the board of jury commissioners did not certify as to the names that are in that book, did you?

Answer: We certified the names that we turned over, that we put into the jury box.

Question: Do you know that book contains the names that you turned over?

Answer: No, sir, I have not verified it at all. Mr. Body is here today, he did not examine and verify the contents of this book in my presence. You will have to ask him. I couldn't tell you whether one member of the Board did it while the others looked on or not, but I did not see him [fol. 25] examine and verify the contents of the book in my presence. The same thing is true as to Mr. Chandler who is not here, but the other gentleman, Mr. Matthews, is here.

Under instructions from the Court the witness examined the certificate on the cover of the book which contained printed names of individuals on the jury list.

The witness then continued:

He asked me if I had seen this book and verified it and if I had verified the list and I said no. Yes, I have seen that certificate. I did not examine the book.

Question: This is not the list that was put in the box?

Answer: That was a separate list, this is a copy of it.

Question: Now, did you check this to know that?

Answer: No.

Question: How do you know it is a copy?

Answer: It is supposed to be.

As to who on the Board would know about those names on the books, well, I don't know that any of them would know. I don't know. I did not see any of them verify the list. I think Mr. Simmons, the Clerk of the Court, was present at some of the meetings. As to what particular meetings he attended, I think at this particular meeting he was there, and he was with us when we went to the printing office and put the cards in the jury boxes. As to the information about the printing office, or taking the names of some particular printer in Atlanta, or having someone under contract with the county, or how we do that, Mr. Simmons had it done. Mr. Simmons, in his official capacity as Clerk of the Board of Jury Commissioners. After the Board of Jury Commissioners selected the names from the tax digest, as I have testified, we make up the list and turn the list over to Mr. Simmons. We see the list again when the printer has completed the list and has it all ready, we go and take those names and have them cut up in sections, put them in the [fol. 26] jury box.

Question: Do you or other members of the Board of Jury Commissioners ever take the list, after you have sent it to the printer and after the printer has done the printing and after the list and the printed work is returned to you, and other members of the Board then hold another session and check all that over again?

Answer: No, sir.

Question: Then you necessarily must rely on the accuracy of the printer in printing accurately the list that you turn over to him?

Answer: That is right. Everybody makes mistakes. There could be a mistake in printing. But we took those

lists from the printer and checked them as closely as we could. We checked them with the other members. We did not check them back with those here, but with the list that we put in the jury box. I don't know, but I think this was printed at the same time as the other list was printed, that is, the other list that was put in the box. As to whether or not this is a copy of the other list and as to how I know that if I did not check it, I took somebody's word for it.

Cross-examination.

By Mr. Carl Copeland:

Yes, we as commissioners went to the tax digest of Fulton County and checked the returns of Fulton County. We checked every one of them and made up a list of those returns of both the white taxpayers and the colored taxpayers, then we took those lists and considered them individually as to what we thought of them as being fit for jury service in compliance with the law, then we took that list and made up a list of those that we thought were suitable for jury service. We didn't try to put all the names in there, we made a selection of names, a selection of the list as to colored and as to [fol. 27] white. At no time did we eliminate any person by reason of the fact that he was of a different color from some other person. We did not eliminate a person because he was a colored man and we didn't eliminate a person because he was a white man. Yes, we have a secretary or clerk of the commission. The clerk of the commission is a lady sitting over there. She was the one that did the typing. Mr. Simmons is the legal secretary of the commission and he handles the printing of the list, and so forth and what he did with them I do not know. We simply revised the list and turned over to him the ones we thought should go in the jury box. After the list was printed we checked that list back with the list which we had furnished to him.

[fol. 28] Mr. J. W. SIMMONS, being first duly sworn, testified as follows:

Direct examination.

By Mr. Gleason:

I am Mr. Simmons, the Clerk of the Superior Court of Fulton County, Georgia, and by virtue of my duties as Clerk of the Superior Court I am likewise the Clerk of the Board of Jury Commissioners. As to what active participation I took in the selection of jurors, grand and traverse, for Fulton County, I didn't take any part in the selection of the names that go in the jury box. I do not attend all of the meetings of the Board of Jury Commissioners. I name one of the ladies in my office to act as secretary, typist or stenographer to the jury commission, Mrs. Truitt. She is a deputy clerk of Fulton Superior Court, but there are some matters I attend to myself, the printing of the lists and so forth.

Question: Now, just explain the machinery that is in operation from the time the Board of Jury Commissioners takes the tax digest and selects the names to make up the tickets that are placed in the jury boxes, if you know?

Answer: I am looking at the official list of the jurors in the jury boxes at this time. This revision was completed in July of '49, begun in August of '48, took about eleven months. The Jury Commission adopted this method and this revision and took the books from the tax receiver's office.

The books I have reference to are the tax returns, and they were the returns that had been put in bound volumes, they are the returns of the taxpayers themselves. We employed a group of young women assistants who went through these returns and made a card on each return showing the name and address, if the return showed it, the property and so on, and information they took off in condensed form for the jury commission. After they had prepared a number of these cards, the Commission would meet and take these cards and study them, the information [fol. 29] contained on them, and make a selection. If they

selected a certain name, that name was given to Mrs. Truitt who typed it, and she kept in that manner a typewritten list of all the names selected at different meetings of the Commission. Now, do you want me to go ahead and complete the story? When the jury commission had completed its work—some few days before they completed the work, they told me the approximate number of names that would be in the list, just in round numbers; and I asked the purchasing agent to obtain bids on the printing of these names on tickets. Well, when the list was finally completed, that list of names was furnished to the printer and when the printer returned a proof to the jury commission, and upon the completion of this checking, the proof sheets were sent back to the printer with such corrections, if any, that were made on it, and he then printed those lists. Now, we have in this county three jury boxes. The printer was requested to print four copies of the list, the petit jury; three of the copies were cut up into tickets for the three jury boxes; one copy was retained and placed in this binder. They printed two copies of the grand jury list, one for the grand jury box and one to be placed in this binder. When the printer notified us that the printing was ready, the jury commission went to the printing office. I went with them and we carried the four jury boxes, the grand jury box, the Superior Court jury box, Civil Court jury box and box for the Criminal Court of Fulton County, and in my presence and in the presence of the jury commission, these sheets were cut up by cutting them into strips and then cutting this way, making tickets out of them, and these cuttings were placed in three separate boxes. One grand jury list was cut up in that same manner and put in the grand jury box and this certificate was prepared and one copy of the printing was put in this binder and certificates attached to it. The young ladies who are employed are in the Commissioners' [fol. 30] office, the jury commissioners' office. They take in the first instance the tax returns and take off information and make a card for the Board of Jury Commissioners. We have these cards in the office. I don't know whether or not the Board of Jury Commissioners themselves check the information taken by the clerks employed by them from the tax returns turned over by the tax receiver. I did not as Clerk of the Board of Jury Commissioners ever do it

myself. As to why the Board of Jury Commissioners and myself as Clerk do not take the tax digest, which is in bound form, and after it has been approved by the State Revenue Department, and make our selection from that Digest after it becomes an official digest, rather than take it from the returns which are not official documents until accepted by the State Revenue Department, well, the law requires that the jury commission begin its work on the first Monday in August or within thirty days thereafter. No Fulton County Digest is ever ready at that time. From the cards made up by the clerks, the jury commissioners then decide who they will select for jury service. I am not certain whether yellow cards are made by these clerks in taking the names of negroes off the tax returns or whether they are white. I will have to check them and see. After the Board of jury commissioners decide who they will select from the cards prepared by their employees, they make up the list and I take the list to the printer. After the jury commission has finished the task of selecting names and set it on a list, we send to the printer a typewritten list of those names.

The names that the jury commissioners select are the names that appear on the cards taken by these ladies or these clerks whom they employ to take that information from the tax returns and the names are put on a list when they make a selection and taken to the printer and the printer prints the list, but he first makes up a proof which is sent to the jury commissioners for verification and the jury commissioners have a copy of the list that they sent [fol. 31] to the printer, they make it up in duplicate, make carbon copies of it. Then that list goes back to the printer for printing, the proof sheet that goes back with such changes or corrections as the jury commission has made to the printer and from that corrected list he prints the names that go in the jury boxes. I instruct the printer to print the names of the negroes on the yellow sheets.

Question: Then actually the address of the man selected, the negro juror has already been found and determined, he has already been selected, and the yellow sheet don't help anyone to locate him at all because he has already been selected; isn't that true, at the time the yellow sheets are made?

Answer: He has already been selected as a prospective juror.

Question: Then the fact that his name was put on a yellow sheet wouldn't be of any assistance in helping anyone determine whether he could be located as a prospective juror?

Answer: Well, that is a problem for the process server. If he knows that man is white or that man is colored, he can locate him easier.

Question: Does the process server have access to those yellow tickets in the jury box?

Answer: Nobody has access.

Question: Then he wouldn't know from the yellow sheet, that wouldn't be of any assistance to him, would it?

Answer: Well, when a jury is drawn by the judge from the box, if he draws a yellow ticket out, a notation to that effect can be made on the drawn list and he would know it.

Question: Well, he could make that if it was on a white piece of paper, he could do the same thing?

Answer: Why, certainly, he could make one white and one colored if he wanted to. If the word colored was indicated on the white slip when the name was picked up by the person drawing the jury and read off, there is nothing to prevent the Board from putting his address under that. [fol. 32] I don't know any reason why it couldn't be done. I would think that would serve the same purpose as having a yellow ticket to designate him as a negro.

Question: Now, do you, after that list is certified and filed by the Board of Jury Commissioners, do you then copy that list in a book?

Answer: No, that is what I call the book.

Question: That is it?

Answer: Yes, sir.

Question: And it is the book and list both?

Answer: That is correct. That is the book containing a list of names that are put in the jury box. That is an exact duplicate of the names in the box because it is run off the same type. Although I did not check that personally, I am positive. I didn't go out there when they were actually printing it.

Question: Then you suppose it is?

Answer: I believe it is.

Q. That is better.

I think about one hundred colored people in Fulton County appear on the book that I, as Clerk, have certified as members of the Grand Jury and I can count them for you. I have now procured the number of names on that list who are on the Grand Jury who are colored, and the same thing for the petit jury. There are one hundred names in the grand jury and are colored, and there are two thousand grand jurors in all, one hundred of which are colored, making nineteen hundred white and one hundred negroes. I am not familiar with the population of Fulton County, that is, white people, and I do not know. As to the number of people whose name appears on the tax digest, colored and white, in round numbers there is between 110,000 and 120,000, somewhere in there.

The total number of names in the petit jury box now is 21,624, 20,509 of which are white.

[fol. 33] Cross-examination.

By Mr. Copeland:

I am in my twenty-second year as Clerk of the Superior Court. I have been assisting in the drawing of the jury and compiling jury lists for that length of time. I have often seen negroes serving on the petit jury in this county. They serve practically every week, practically every week we have jury business. Occasionally they may not, but it is the usual thing. As to how many usually are on the jury here in this county, my best estimate of it, there would be six or eight every week, actually impaneled on the jury and we have negroes serving on the grand jury. As to whether or not there are any negroes on the present term of the grand jury, when the present grand jury was impaneled there were no negroes at the time and we didn't have twenty-three grand jurors present, the Judge drew some additional names and secured other men to serve. I do not know whether any of them were negroes or not. I do not think, however, any negroes are on the present grand jury. There were five, I believe, on that grand jury in July and August and they actually served on the grand jury.

Defendant introduced in evidence a certified copy of the

certificate attached to the cover sheet of the book containing the names (printed) of persons selected for jury service by the jury commissioners of Fulton County, Georgia. The certificate being as follows:

"CERTIFICATE OF THE JURY COMMISSIONERS

1948

STATE OF GEORGIA,
County of Fulton:

We, the undersigned, Jury Commissioners of the County of Fulton, and State of Georgia, met on the first Monday in August, 1948, for the purpose of revising the jury boxes, both petif and grand, of the County of Fulton.

All of the Jury Commissioners took oath of office before the ordinary, prior to meeting. We were charged by the [fol. 34] Honorable Judge Virlyn B. Moore, and went into session. Mr. George A. Campbell was elected chairman of the commission, and soon work was completed in Room 221. Mr. Wiley L. Moore began service with us but pressure of business made it necessary for him to request excuse.

We worked for 83 days preparing the lists. These names were taken from the tax returns for 1948, which were furnished to us by the tax receiver as required by law. We selected 21,624 names for the petit jury and from this petit jury list, we selected 2,000 names as grand jurors. The lists were turned over to the printer. We reconvened on May 25, 1949, to arrange for checking of the lists by our clerks and on July 25, 1949, met for the last time, destroying old tickets in present boxes, refilling with new lists of names.

We certify that we ourselves placed slips containing the individual names of the petit jurors in a box for the Superior Court, and in the box for the Criminal Court of Fulton County, and in the box for the use of the Civil Court of Fulton County. We likewise placed 2,000 individual slips in the grand jury box containing the names of the grand jurors.

(S.) Geo. A. Campbell, Chairman. (S.) T. D. Body, Sr., Henry W. Chandler, Albert G. Matthews.
(Commissioner Seal.)

(S.) J. W. Simmons, Clerk of the Superior Court of Fulton County, Georgia.

Sworn to and subscribed to before me this the 25th day of July, 1949. (S.) John W. Walton, Notary Public, Fulton County, Georgia."

[fol. 35] DEPUTY CLERK'S CERTIFICATE

"STATE OF GEORGIA,
County of Fulton:

I, Lee Earl Largen, Deputy Clerk of the Superior Court of Fulton County, Georgia, do hereby certify that the within and foregoing is a true and correct copy of Certificate of the Jury Commissioners for the year 1948, which appears on the front page of Jury List, all of which appears of file and record in this office.

Given under my hand and seal of office This the 1st day of June, 1951.

(S.) Lee Earl Largen, Deputy Clerk, Superior Court, Fulton County, Georgia." (Seal of Superior Court, Fulton County, Georgia.)

[fol. 36] Defendant introduced in evidence a cloth-bound bulky book containing printed names of persons in Fulton County, Georgia, selected by the Jury Commissioners of said County for grand and petit jury service in the manner shown by the evidence, which said book had attached or pasted to the inside cover thereof the certificate of the jury commissioners and the Clerk, Mr. Simmons, said certificate being dated the 25th day of July, 1949, exact copy of which appears on pages 14, 15, of the brief of evidence.

This book contains names of 1900 White Grand Jurors, 100 Colored Grand Jurors, 20,509 White Petit Jurors, 1,115 Colored Petit Jurors.

It was stipulated and agreed that according to the tax digest of Fulton County, Georgia, there were 105,035 white

people and 17,736 colored people on the tax digest for the year 1950.

It was stipulated and agreed that Fulton County had a population of 671,797, according to the 1930 census.

It was stipulated and agreed that of the total population of 663,771 people, according to the 1950 census, that 165,814 were colored, and 505,983 were white people.

JUDGE VIRLYN MOORE, being first duly sworn as a witness, testified as follows:

Direct examination.

By Mr. Gleason:

I am the oldest Judge or Presiding Judge of the Superior Courts of Fulton County, Georgia. All are the same rank. We arranged the drawing of the Grand and Traverse Jurors as follows: We have one Judge who is known as the presiding Judge, the Judge in chambers, and he is the Judge that draws the juries and organizes them. For instance, Judge [fol. 37] Wood is the chambers Judge, this term, he drew the jury, and in August I was the presiding Judge and I drew the jury. That was in August, 1951, and the 1951 panel is the panel that is put upon for the trial of cases at this term of court. I will explain for the record the mechanics employed by me in drawing a jury in Fulton Superior Court. The jury box is brought to the Judge's chambers in the court room by the Deputy Sheriff and we have a Deputy Clerk who is a young lady and a typist; she comes up and the jury box is unlocked and the seal broken by the Judge and the jury is in two divisions, box No. 1 and box No. 2. We take the tickets with the names on them out of No. 1. I don't know how the other judges do, but I reach down and pick up maybe two or three or half a dozen tickets and put them in a little box which we have for that purpose. After I get a number in there, say forty or fifty, or something like that, they are turned over to the Deputy Sheriff who turns them over to the Deputy Clerk who makes a typewritten list of them. Those that are put on the list are put back in box No. 2 or apartment No. 2, the jury box, and then some more are taken out until we get the required number. We generally draw from 150 to 200 jurors for each division of the

court, that is, the Civil and Criminal divisions. That is the operation. This court, called the Fulton Criminal Division of the Superior Court is the Criminal Division of Fulton Superior Court and the jurors that I drew in the manner I have just testified appear on the panel put upon the defendant in this case. The jury box on which I break the seal has two compartments, Compartment No. 1 and No. 2, and when I spoke of reaching in Compartment No. 1 and drawing out two, three or four tickets and putting them in another box, that is a small box that we put in for the purpose of turning it over to the clerk to copy.

Question: In other words the tickets go from panel No. 1 into another box and not back into panel No. 2?

[fol. 38] Answer: No, they don't go into Compartment No. 2 until after they have been put on the list by the Deputy Clerk; then they go back in compartment No. 2 of the jury box.

Question: Now, as you draw the tickets out of compartment No. 1, two or three at the time, do you read the names on those tickets?

Answer: I do not.

Question: Do you look on those tickets?

Answer: Sometimes I do and sometimes I don't.

Question: You merely go through the mechanical process of depositing them in a cigar box?

Answer: Well, it is a little cigar box used for that purpose.

Question: Then the cigar box—how many names do you put in that cigar box before you quit drawing, Judge?

Answer: Sometimes you draw forty or fifty, enough to get them started. There is no special number, we draw two or three times, maybe four times to get enough to make out that list.

Question: Now, the Deputy Clerk of the Superior Court, I presume, is the person you have reference to as the Deputy, one of the Clerk's deputies?

Answer: Well, the Deputy Sheriff, I turn them over to him and he takes them and arranges them and puts them over to the Depuy Clerk.

Question: No one knows what names you have put in the cigar box until the Deputy Clerk or the Deputy Sheriff gets them arranged, is that it?

Answer: Well, you would know if you looked at them, I don't know then, I don't really know after they make the list unless I read it over, who is on there; very often I have drawn my own brother and not known he was on it until he appeared here.

The Deputy Sheriff puts the names out in front of the [fol. 39] typist who is a Deputy Clerk so she can type them. He puts every name out before the typist that I draw from the jury box by putting them on her desk, puts them out in front of her and I am right there when that is going on and I am there for the completion of the whole process all the way through the whole time, yes, sir. When the stenographer has copied off the tickets on the list the deputy puts them in a little cigar box marked No. 2, which is another box which is No. 2 and when they get through copying them, then I take that and put those tickets back in compartment No. 2 of the jury box. I drew this jury on August 19th of this year, I drew it, I guess you would call that the Judge's chambers, the outer office there, connected with the court room, 405, I think—I think that is 405 or 406. Yes, I hold court in that room. That is a court room now for the judge in chambers. He holds mostly motions or non-jury matters. Of course there have been a lot of juries in that court room. There is a jury box and it is all equipped for jury business.

Question: Now, Judge Moore, when you draw these tickets out of the panel No. 1 of the jury box, do you ever notice any yellow tickets?

Answer: Some yellow tickets in there, yes, sir.

Question: Are those visible to you as you lift the tickets out of the panel No. 1?

Answer: Yes, sir. As to why those tickets are printed yellow I do not know. I have been here twenty-five years and when I came they were that way and they have been that way ever since. I don't know why they have yellow and white and why that custom ever started. That has been the custom in this County for many, many years.

The difference in color is not of any material help to me in performing my duties in drawing a jury. None at all.

I do not pay any attention at any time to the color of [fol. 40] those tickets. I don't think I ever picked up one ticket unless we just happened to need one more to fill out

the panel. I just reach in there and pick out between my finger and thumb a bunch and if there is a yellow one in there, it is there, but of course there are a great many more whites than yellow, but if a yellow is in there when I pick it up, I put it down. That is the way it goes.

Cross-examination.

By Mr. Copeland:

At the particular time when I was drawing these jurors for this term of court, I probably looked down into panel No. 1, some time. I probably looked down but I didn't pick out any special tickets or try to get any special color or any special person. I didn't make any selection as to white and yellow slips. Absolutely none. I have never at any time in drawing a jury in this county made any selection as to whether they were white persons or colored persons that were in the box. I have been Judge of this court—on my twenty-fifth year now. I have petit jurors that are colored here in court. Sometimes we have an entire panel or more. I think it was five colored grand jurors last time here. It is a common practice for both colored and white to serve on the jury. It certainly is, it occurs very often.

Redirect examination.

By Mr. Gleason:

Question: I don't know whether I made it clear—it is not clear to me—after you draw the name and give it to the typist or the deputy to give to the typist to type, do you make any inspection of the specific name that you have withdrawn from panel No. 1 in the jury box to be sure that name is copied on the list by the stenographer and the deputy clerk?

Answer: Well, I can't say that I watch every ticket as it is put down; I give it to them and they are there working [fol. 41] under my supervision and I suppose if they wanted to slip one in the wastebasket or something they could do it without my seeing it, but I am there supervising and of course a Judge can't watch everything.

At the conclusion of the evidence, the court overruled the

challenge to the array on each and every ground and ordered the case to proceed.

[fol. 42] IN SUPERIOR COURT OF FULTON COUNTY

INDICTMENT FOR RAPE

Number —

STATE OF GEORGIA

v.

JAMES AVERY

JUDGMENT—September 17, 1951

The challenge to the array of traverse jurors as amended having been traversed by the State, and having been presented to the court for determination; after hearing evidence and argument of counsel;

It is considered, ordered and adjudged that said challenge to the array of traverse jurors as amended be, and the same is hereby overruled on grounds 7, 8, 9, 10, and 11, grounds 1, 2, 3, 4, 5, and 6 having been previously stricken by the court on motion of counsel for the State.

This the 17 day of September, 1951.

Claude D. Shaw, Judge Superior Court, A. J. C.

[fol. 43] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

Walker Superior Court—Transferred to Fulton Superior Court on order changing venue.

BILL OF EXCEPTIONS PENDENTE LITE—Filed September 18, 1951

Be it remembered in said stated matter there came on to be heard before the trial of said case on the merits, the challenge to the array of traverse jurors, the demurrer of

the State of Georgia thereto, and the issues of fact made by the answer and traverse to said challenge;

Be it further remembered that the Hon. Claude D. Shaw, Judge Superior Court, Atlanta Judicial Circuit, took under consideration the demurrer of the State of Georgia to the challenge to the array of traverse jurors and after argument of counsel and consideration by the Court, the Honorable Judge Claude D. Shaw entered the following order, to wit:

"The General demurrers to and motion to strike the defendant's challenge to the array of traverse jurors in the above-styled case coming on to be heard, after consideration thereof and argument of counsel;

"It is considered, ordered and adjudged that said general demurrers and motion to strike are sustained as to Paragraphs 1, 2, 3, 4, 5, and 6 of said challenge to the array of traverse jurors, and Paragraphs 1 to 6, both inclusive, are hereby stricken.

"It is further considered, ordered and adjudged that said general demurrers and motion to strike said challenge to the array of traverse jurors be and the same are, hereby, overruled as to paragraphs 7, 8, 9, 10, and 11 thereof.

"This the 18th day of September, 1951.

(S) Claude D. Shaw, Judge Superior Court, A. J. C."

[fol. 44] To this order of the court sustaining the general demurrers of the State of Georgia to grounds 1 to 6 inclusive of the challenge to the array, the defendant, James Avery, then and there excepted and now excepts and assigns the same as error and says that the court erred in sustaining said demurrers and striking Paragraphs 1 to 6 inclusive of said challenge and that the order of the Court aforesaid striking Paragraphs 1 to 6 inclusive of said challenge to the array was and is contrary to law.

Be it further remembered that there then came on to be heard before the Hon. Judge Claude D. Shaw, Judge Superior Court, Atlanta Judicial Circuit, the issues of fact made by the traverse and answer to said challenge, that evidence was introduced both by the defendant, James Avery, and the State of Georgia; that said issue of fact was submitted to the court by said evidence and that the

court, after consideration of said evidence, entered the following order, to wit:

"The challenge to the array of traverse jurors as amended having been traversed by the State, and having been presented to the Court for determination; after hearing evidence and argument for counsel:

"It is considered, ordered and adjudged that said challenge to the array of traverse jurors as amended be and the same is hereby overruled on grounds 7, 8, 9, 10, and 11, grounds 1, 2, 3, 4, 5, and 6 having been previously stricken by the court on motion of counsel for the State.

This 18th day of September, 1951,

(S) Claude D. Shaw, Judge Superior Court, A. D. C."

To this order of the court overruling and denying said grounds of challenge to the array, the defendant, James Avery, then and there excepted and now excepts and assigns the same as error and says that the court erred in refusing to sustain the grounds of challenge made by the defendant, and that the order of the court thereon was and is contrary [fol. 45] to law.

Wherefore, defendant prays that this his Bill of Exceptions Pendente Lite, be certified to as true and ordered placed on the record.

This 18th day of September, 1951.

Frank M. Gleason, George Paul Shaw, Attorneys for Defendant.

Address:

Rossville, Georgia
LaFayette, Georgia

CERTIFICATE TO BILL OF EXCEPTIONS PENDENTE LITE

The foregoing bill of exception pendente lite is hereby allowed and certified to as true. Let the same, with this certificate, be placed upon the records.

This 18th day of September, 1951.

Claude D. Shaw, Judge Superior Court, Atlanta Circuit.

[File endorsement omitted.]

[fol. 46] IN SUPERIOR COURT OF FULTON COUNTY

BILL OF EXCEPTIONS—Filed January 24, 1952

GEORGIA, FULTON COUNTY:

To the Supreme Court of the State of Georgia:

Be is remembered that in the case of the State of Georgia versus James Avery, the same being indictment No. 4169 returned by a Grand Jury in the Superior Court of Walker County, Georgia, on the 21st day of February, 1951, charging James Avery, a negro, with the offense of rape on a white woman, the defendant therein, James Avery, before the return of said indictment by a Walker County grand jury, and after being informed of the intention of the Solicitor-General of the Lookout Circuit to present an indictment against him to said Walker County grand jury charging him with the offense aforesaid, filed his challenge to the array of grand jurors in the Superior Court of Walker County, Georgia, alleging the unconstitutionality of the statute by virtue of which said grand jury was drawn, and the violation of certain specific provisions of the State and Federal Constitutions, the unconstitutional application of a constitutional law, the failure to comply with other statutory provisions by the Clerk of the Superior Court of Walker County, Georgia, respecting the making and keeping of a correct jury list, the invalidity of the certification of the lists and a failure to keep a book containing the names of jurors in the box, as well as other grounds of objections to the grand jury which was about to consider said indictment against him, all as shown by said challenge to the array; that said challenge to the array was properly served upon the Solicitor General of the Lookout Judicial Circuit; that after notice to said Solicitor General, said challenge to the array came on to be heard before the Honorable Freeman C. McClure, Judge of the Superior Court of the Lookout Judicial Circuit; that the State filed no traverse to the allegations of fact contained therein; that evidence was introduced by the defendant in support of his grounds of challenge to the array, and the court, after the introduction of evidence and a full hearing on all issues of law and facts raised by said challenge and

[fol. 47] after argument of counsel thereon, entered the following order, to wit:

"The within challenge coming on regularly to be heard, upon evidence heard, and after the argument had, the same is hereby overruled.

This 19th day of February, 1951.

(S.) Freeman C. McClure, Judge Superior Court, Lookout Circuit."

First Assignment of Error

To this order of the court overruling defendant's challenge to the array the defendant, within the time provided by law tendered his bill of exceptions pendente lite, and the same was duly certified as true and filed on the 21st day of February, 1951, and the defendant, James Avery, then and there excepted to the order of the court overruling his challenge to the array of grand jurors, and now excepts and assigns error on the said bill of exceptions pendente lite and upon the rulings thereon excepted to, and says that the court erred in overruling said challenge to the array, and that the order of the judge overruling said challenge to the array, was and is contrary to law.

Be it further remembered that after the return of said indictment by a Walker County grand jury, charging the said James Avery with the offense of rape, that the said James Avery filed, in the Superior Court of Walker County, Georgia, his certain motion for a change of venue, alleging therein that there was a probability of lynching in Walker County, Georgia. A hearing was had on said motion for change of venue and said application was denied. Within the time provided by law, the said James Avery filed his certain bill of exceptions to the Court of Appeals of Georgia, assigning error on the order of the judge of the Superior Court of Walker County, Georgia, refusing to grant a change of venue; that the Court of Appeals of Georgia, on April 10, 1951, and after consideration of said appeal, and all things necessary to properly effect said appeal, reversed the judgment of Walker Superior Court and [fol. 48] ordered a change of venue. (See Avery vs. State, 83 Ga. App. page 700); that after the reversal of said case

by the Court of Appeals of Georgia, a judgment was duly entered on the remittitur in Walker Superior Court, making the judgment of the Court of Appeals of Georgia the judgment of Walker Superior Court, and thereafter, on the 22nd day of May, 1951, an order was duly entered by the Honorable Freeman C. McClure, Judge of the Superior Court, Lookout Judicial Circuit, granting said change of venue and changing the venue of said case to the Superior Court of Fulton County, Atlanta, Georgia, to which court said case was transferred for trial.

Be it further remembered that said case came on to be tried in the Superior Court of Fulton County, Georgia, on the 17th day of September, 1951, before the Honorable Claude D. Shaw, and a jury. Before arraignment said defendant, James Avery, filed his certain challenge to the array of traverse jurors put upon him in the Superior Court of Fulton County, Georgia, and thereafter filed his certain amendment to said original challenge to the array; that the State of Georgia filed its demurrer to and motion to strike the challenge to the array of traverse jurors and also filed its traverse to the allegations of fact set up in the defendant's challenge to the array.

A hearing was had on the said demurrer and motion to strike said challenge to the array before the Honorable Claude D. Shaw, Judge aforesaid, who, after argument of counsel thereon entered the following order, to wit:

"The general demurrers to and motion to strike the defendant's challenge to the array of traverse jurors in the above-styled case coming on to be heard, after consideration thereof and argument of counsel: It is considered, ordered, and adjudged that said general demurrers and motion to strike are sustained as to paragraphs 1, 2, 3, 4, 5, and 6, of said challenge to the array of traverse jurors [fol. 49] and paragraphs 1 to 6 both inclusive are hereby stricken. It is further considered, ordered, and adjudged that said general demurrers and motion to strike said challenge to the array of traverse jurors be and the same are, hereby overruled as to paragraphs 7, 8, 9, 10, and 11 thereof.

This 18th day of September, 1951.

Signed: Claude D. Shaw, Judge Superior Court, Atlanta Judicial Circuit."

Second Assignment of Error

To this order of the court sustaining in part the State's demurrers and motion to strike, as aforesaid, the defendant, within the time provided by law, tendered his bill of exceptions pendente lite, and the same was duly certified as true and filed on the 18th day of September, 1951, and the defendant, James Avery, then and there excepted to the order of the court sustaining in part the State's demurrers and motion to strike, and now excepts and assigns error on the said bill of exceptions pendente lite, and upon the rulings thereon excepted to, and says that the court erred in sustaining in part the demurrers and motion to strike, and that the order of the court sustaining in part said demurrers and motion to strike was and is contrary to law.

Be it further remembered that there came on to be tried before the Judge, without the intervention of a jury, the issues of fact as made by the traverse filed by the State of Georgia to the challenge to the array of traverse jurors; that evidence was introduced by the defendant in support of the allegations of fact set forth in his challenge to the array of traverse jurors and that after the introduction of evidence, and the argument of counsel, the Honorable Claude D. Shaw, Judge, entered the following order, to wit:

"The challenge to the array of traverse jurors, as amended, having been traversed by the State, and having been presented to the Court for determination after hearing evidence and argument of counsel: It is considered, [fol. 50] ordered, and adjudged that said challenge to the array of traverse jurors, as amended, be and the same is hereby overruled on grounds 7, 8, 9, 10, and 11, grounds 1, 2, 3, 4, 5, and 6, having been previously stricken by the court on motion of counsel for the State.

This 18th day of September, 1951.

Signed: Claude D. Shaw, Judge Superior Court, Atlanta Judicial Circuit.

Third Assignment of Error

To the foregoing order of the Judge overruling and denying the prayers of said challenge to the array of traverse jurors, the defendant, within the time provided by law,

tendered his bill of exceptions pendente lite, and the same was duly certified to as true and ordered placed on the record and filed on the 18th day of September, 1951, and the defendant, James Avery, then and there excepted to the order of the judge denying and overruling the prayers of his challenge to the array of traverse jurors, and now excepts and assigns error on said bill of exceptions pendente lite, and upon the rulings thereon excepted to, and says that the judge erred in denying and overruling the prayers of said challenge to the array of traverse jurors; that the evidence offered in support thereof demanded that said challenge to the array of traverse jurors be sustained and that the order of the court thereon was and is contrary to law.

Be it further remembered that said case then came on to be tried in the Superior Court of Fulton County, Georgia, before the Honorable Claude D. Shaw, Judge, and a jury. The defendant entered his plea of not guilty upon arraignment; that defendant's counsel was supplied with Panels 6, 7, 8, 9, 10, and 11 of prospective traverse jurors, each of said panels containing the names of twelve men; that, while defendant was a negro, charged with the offense of rape [fol. 51] on a white woman, the entire traverse jury of sixty men out upon defendant were all white and there were no colored jurors on any of said panels; that from the jurors put upon defendant a jury was stricken and said case proceeded to trial.

Evidence was introduced in behalf of the State of Georgia in support of the allegations of said indictment. After the State closed its proof, said defendant made an unsworn statement in his own behalf, contending that he was entirely innocent of the crime charged, that the prosecutrix who did not know him had made a mistake in his identity.

After a lengthy trial, argument of counsel, and charge of the court, the jury returned a verdict on the 20th day of September, 1951, finding defendant guilty of the offense of rape, without a recommendation, and pursuant to the verdict of the jury the Honorable Claude D. Shaw, Judge, as required by the laws in such cases, then and there imposed a sentence, sentencing defendant to death by electrocution.

Be it further remembered that thereafter and within the

time provided by law, defendant filed his certain motion for new trial; that a rule was issued thereon, and service acknowledged; that by appropriate orders of the Honorable Claude D. Shaw, Judge, the hearing thereon was continued from time to time, until said motion for new trial was disposed of as hereinafter alleged.

Be it further remembered that defendant, within the time provided by law, presented his amended motion for new trial, the same having been duly allowed, approved, and ordered filed by the Judge, all as shown by the order of the Judge on the amended motion for new trial; that a brief of evidence was duly approved and allowed by the court and was duly filed on the 11th day of January, 1952; that said motions for new trial, as amended, came on to be heard before the Honorable Claude D. Shaw, Judge of the Superior Court, Fulton County, Atlanta Judicial Circuit, on Janu- [fol. 52] ary 11, 1951, when the Judge, after consideration of said motion for new trial as amended, the brief of evidence in support thereof, and argument of counsel thereon, entered an order overruling said motion and denying defendant a new trial.

Fourth Assignment of Error

To this order and judgment of the court overruling each and all of the grounds of the motion for new trial as amended, the defendant then and there excepted, and now excepts, and assigns error thereon as being contrary to law, and says that the court erred in overruling said motion for new trial as amended on each and all of the grounds stated in said original and amended motion for new trial, and that the order of the court overruling and denying said motion for new trial as amended was and is contrary to law.

The order of the court overruling all of the several grounds of the motion for new trial as amended illegally terminated said case.

Designation of Record

The defendant, James Avery, specifies as material to a clear understanding of the errors complained of in this

bill of exceptions the following portion of the record, to wit:

1. The bill of indictment in the case of the State versus James Avery, the same being numbered 4169 to the February Term, 1951, of Walker Superior Court, together with each and all of the entries thereon, and transmitted by order to the Clerk of the Superior Court of Fulton County, Georgia.

2. The plea of not guilty of the defendant, James Avery, entered on said indictment.

3. The challenge to the array of grand jurors filed in the Superior Court of Walker County, Georgia, on the 19th day of February, 1951, and transmitted by order to the Clerk of the Superior Court, Fulton County, Georgia.

[fol. 53] 4. The brief of evidence offered in support of the challenge to the array of grand jurors duly certified, approved, allowed, and ordered filed by the Honorable Freeman C. McClure, Judge, Superior Court, Walker County, Georgia, and filed on May 22, 1951, in the office of the Clerk of the Superior Court of Walker County, Georgia, and transmitted by the order changing the venue to the Clerk of the Superior Court of Fulton County, Georgia.

5. The order of the Honorable Freeman C. McClure, Judge, Superior Court of Walker County, Georgia, dated February 19, 1951, overruling said challenge to the array of grand jurors in Walker Superior Court and transmitted by order to the Clerk of the Superior Court of Fulton County, Georgia.

6. Bill of Exceptions pendente lite filed in the Superior Court of Walker County, Georgia, to the order of the Judge of the Superior Court of Walker County, Georgia, overruling said challenge to the array of grand jurors, and filed on the 21st day of February, 1951, and transmitted by order to the Clerk of the Superior Court of Fulton County, Georgia.

7. Order of Honorable Freeman C. McClure, Judge of the Superior Court of Walker County, Georgia, dated May 22, 1951, granting a change of venue and transferring said cause and the entire record therein to the Superior Court of Fulton County, Georgia.

8. Challenge to the array of traverse jurors filed in the Superior Court of Fulton County, Georgia, on September 17, 1951.

9. Amended challenge to the array of traverse jurors as filed on the 17th day of September, 1951.

10. The State's demurrer to and motion to strike the challenge to the array of traverse jurors, filed in the Superior Court of Fulton County, Georgia, on September 17, 1951.

11. The State's traverse to the challenge to the array of traverse jurors filed in the Superior Court of Fulton [fol. 54] County, Georgia, on September 17, 1951.

12. Order of the Honorable Claude D. Shaw, Judge of the Superior Court, Atlanta Judicial Circuit, sustaining said demurrer and motion to strike, in part, to said challenge to the array of traverse jurors, dated September 18, 1951.

13. Order of Honorable Claude D. Shaw, Judge, overruling and denying said challenge to the array of traverse jurors, filed September 18, 1951.

14. Bill of exceptions pendente lite to:

(a) The order of Honorable Claude D. Shaw, Judge, sustaining the demurrer and motion to strike, in part, to said challenge to the array of traverse jurors; and,

(b) The order overruling and denying the prayers of said challenge to the array of traverse jurors, filed September 18, 1951.

15. Brief of evidence introduced in the Superior Court of Fulton County, Georgia, in support of the challenge to the array of traverse jurors (which brief of evidence is included in the main brief of evidence introduced in the trial of said case), duly approved, allowed, and ordered filed by the Honorable Claude D. Shaw, Judge, and filed on the 11th day of January, 1952.

15-A. The charge of the court to the jury.

16. The verdict of the jury, dated September 20, 1951, finding defendant, James Avery, guilty of the crime charged.

17. Sentence of the Court dated September 20, 1951, sentencing defendant, James Avery, to death by electrocution.

18. Original motion for new trial filed in the office of the Clerk of the Superior Court of Fulton County, Georgia, on September 20, 1951, together with all orders, entries, and acknowledgment of service thereon.

19. Amendment to said original motion for new trial duly approved and allowed by the Court and ordered filed, and [fol. 55] filed in the Superior Court of Fulton County, Georgia, on the 11th day of January, 1952.

20. Brief of evidence introduced in the Superior Court of Fulton County, Georgia, in the trial of the case (which brief of evidence has included therein that evidence offered in support of the challenge to the array of traverse jurors), all duly approved, certified to as true, and allowed and ordered filed in the Superior Court of Fulton County, Georgia, on January 11, 1952, together with the order of the judge thereon, allowing and approving same.

21. Order and judgment of the court dated January 11, 1952, overruling and denying said motion for new trial as amended.

22. A certified copy of the affidavit (pauper affidavit) filed by the said James Avery at the time of the filing of this bill of exceptions.

23. The entries of filing of each and all part of the record above specified to be entered and transmitted in proper order.

And now, within the time provided by law, comes the defendant, James Avery, and assigning error on all of the rulings complained of herein as being contrary to law, tenders this his bill of exceptions, and names himself as plaintiff in error herein, and names the State of Georgia as the defendant in error herein, and prays that the same may be certified to as provided by law and transmitted to the Supreme Court of the State of Georgia, that the errors alleged to have been committed may be considered and corrected.

Plaintiff in error alleges that this is a capital case and that jurisdiction of this writ of error is in the Supreme Court, under the provisions of Paragraph IV, Article VI, Section II (Code § 2-3704) of the Constitution of the State of Georgia.

Frank M. Gleason, of Counsel for Plaintiff in Error.
[fol. 56] Geo. P. Shaw, of Counsel for Plaintiff in Error.

Gleason & Painter, Attorneys at Law, Rossville, Georgia; Shaw & Shaw, Attorneys at Law, LaFayette, Georgia.

GEORGIA,
Chattooga County:

The State of Georgia, defendant in error, in the within and foregoing bill of exceptions, hereby approves the recital of fact contained therein as being true and correct.

This 23rd day of January, 1952.

Eugene Cook, Attorney General of the State of Georgia, Atlanta, Ga.

John W. Davis, Solicitor-General, Lookout Judicial Circuit; Paul Webb, Solicitor-General, Atlanta Judicial Circuit; Carl Copeland, Assistant Solicitor General, Atlanta Judicial Circuit; Robert E. Coker, of Counsel for the State of Georgia.

CERTIFICATE OF THE JUDGE

GEORGIA,
Fulton County:

I do certify that the foregoing bill of exceptions is true, and specifies all of the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Fulton County, Georgia, is hereby ordered to make out a complete [fol. 57] copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the Supreme Court of the State of Georgia that the errors alleged to have been committed may be considered and corrected.

This 23 day of January, 1952.

Claude D. Shaw, Judge of the Superior Court, Atlanta Judicial Circuit.

Acknowledgment of Service—(omitted in printing).

[fols. 58-59] [File endorsement omitted.]

[fol. 60] IN SUPREME COURT OF GEORGIA

No. 17810

AVERY

v.

THE STATE

By the Court: No error assigned requires a reversal of the judgments complained of.

OPINION—Decided April 14, 1952

James Avery was arrested on October 29, 1950, for the offense of rape in Walker County, and was committed to jail. At the February, 1951, term of Walker Superior Court he was informed by the solicitor-general of the judicial circuit in which Walker County is located that an indictment charging him with rape would be presented for grand-jury action during that term of the court. Prior to indictment, he filed a written challenge to the array of grand jurors, alleging that the grand jury had not been legally organized. His challenge was based on the grounds that Code § 59-106, which requires the jury commissioners to select jurors from the books of the tax receiver, offends stated provisions of the State and Federal Constitutions; that no negro has ever been appointed to membership on the board of jury commissioners of Walker County, but Negroes, because of race and color, have been systematically excluded from service thereon; and that no proper jury lists and jury book have been made up and kept for inspection as required by Code § 59-109. Concerning this it was stipulated: The accused is a Negro man; his alleged victim is a white woman. No Negro has ever been appointed to membership on the board of jury commissioners for Walker County. According to the Federal census for 1950, Walker County has a population of 38,265. The tax digest shows that Walker County, in 1950, had 9364 registered white property owners and 464 registered colored property owners. The jury commissioners revised the lists of grand and traverse jurors for Walker County [fol. 61] in 1950, selecting for such service only those men

whose names appeared on the 1950 tax digest for the county. At the hearing of the challenge an alphabetical list of names, certified by the clerk of the superior court and the six jury commissioners for Walker County as being a correct list of the names of those selected for grand and traverse jury services at the board's meeting, which convened on August 14, 1950, was tendered by the accused and allowed in evidence. Another alphabetical list, by militia districts, and headed "Grand and Traverse Jurors, 1950," but not signed by anyone was also tendered by the accused and allowed in evidence. The letter "G" appears opposite the respective name of several jurors appearing on the latter lists, and the following certificate, dated May 22, 1951, is attached thereto: "Georgia, Walker County. I, Thos. W. Bryan, Clerk Superior Court in and for said County do hereby certify that the foregoing is a true and correct copy of the original Grand and Traverse list, by districts, now remaining on file in this office." No evidence explanatory of the letter "G" was offered by either party, but it was stipulated that the two jury lists introduced by the accused "have been on hand in the Clerk's office ever since October 29, 1950, which is the date of the alleged crime, that they have been available for public inspection, and that at all times there has been a person present at all usual office hours who could and would explain those lists to any person that might be interested as to which were members of the grand jury and which were members of the traverse jury box." No contention was made that the challenged grand jurors were not regularly drawn from the grand-jury box. The objection to the grand jury was denied, and the accused excepted pendente lite.

The accused was indicted for rape. He moved for a change of venue which was subsequently granted and his case was transferred to Fulton County for trial. Upon being arraigned for trial in Fulton County, he filed a written [fol. 62] challenge to the array of traverse jurors put upon him, alleging: in the first six paragraphs of his challenge, that the trial jurors furnished him had been illegally selected and impaneled, because Code § 59-106, which requires the jury commissioners to select jurors from the books of the tax receiver, offends stated provisions of the

State and Federal Constitutions; and, in the remaining paragraphs, because the selection of 20,509 white jurors and 1115 colored jurors from a total number of 105,035 white and 17,736 colored taxpayers is an excessively small number of jurors actually selected for service, and the number of colored jurors when compared with the number of white jurors actually selected is excessively disproportionate and the result of a deliberate and systematic exclusion of a required proportionate number of the Negro race for jury service; that, in making up the jury-box, the jury commissioners have placed the names of white and colored jurors on slips of paper of different colors, the names of the white jurors being placed therein on white slips and the names of the colored jurors being placed therein on yellow slips; that the jury commissioners have not supplied the Clerk of the Superior Court of Fulton County with a proper list of those traverse jurors selected for service as required by Code § 59-109; and that no legal and proper list of traverse jurors has been kept on file in the office of the Clerk of the Superior Court of Fulton County as required by law, and by reason of such failure the accused has been deprived of his right to examine the same and ascertain if the jurors put upon him have been legally selected.

A general demurrer interposed by the State was sustained to the first six paragraphs of the challenge and was overruled to the remaining grounds thereof. The accused excepted pendente lite to that part of the judgment which was averse to him. Concerning this challenge, it was stipulated that Fulton County, 1950, had a population of 671,797, [fol. 63] of which 505,983 were white and 165,814 were colored people, and that tax returns were made in 1950 by 105,035 white and 17,736 colored taxpayers. On the hearing of his challenge the accused introduced three witnesses, who testified in brief as follows: The jury commissioners for Fulton County select all grand and traverse jurors exclusively from the books of the tax-receiver—his tax digest, but no one is selected or rejected for jury service because of race or color. The present jury lists for Fulton County were completed on July 25, 1949. They were made by the jury commissioners from the tax returns of white and colored people for 1948. In its last revision of the jury lists

the board of jury commissioners employed the following procedure: Employees of the board made a card for each separate taxpayer of the county from a bound volume of individual tax returns. From these cards the jury commissioners selected those best qualified for jury duty, making a list of the same as selections were made. The list was then turned over to a printer who made copies of it, after the jury commissioners had checked his proof copy against the original list. From the printer's copies tickets were made and placed in the jury boxes by the jury commissioners and one printed copy was retained intact and placed in a binder, upon the cover sheet of which was attached a certificate by the jury commissioners and the Clerk of the Superior Court of Fulton County, certifying that it contained the names of those selected for jury service by the jury commissioners. In keeping with a practice, which has been carried on in Fulton County for fifty years or more, the names of white jurors are placed in the jury boxes on white slips and the names of colored jurors are placed in the jury boxes on yellow slips. This is done for the purpose of aiding the sheriff in locating and summoning individual jurors. The challenged jurors were regularly drawn from the traverse-jury box by one of the Judges of the Superior Court of Fulton County, without regard to race or color and both white and colored traverse [fol. 64] jurors were drawn. It is a common occurrence for both white and colored jurors to serve. Five colored grand jurors served at the July-August, 1951, term of the court. An entire panel or more of colored traverse jurors sometimes serves. A method adopted and practiced by the Judges of the Superior Court of Fulton County in drawing juries prevents any discrimination in jury service as between the white and the colored jurors.

The objection to the trial jurors was overruled, and the accused excepted pendente lite. The case resulted in a verdict of guilty, without recommendation, and the accused was sentenced to be electrocuted. His motion for a new trial, which was amended by adding several special grounds, was overruled. The accused excepted and sued out a writ of error to this court, assigning error upon the judgment overruling his amended motion for new trial and upon his pendente lite exceptions.

CANDLER, Justice. (After stating the foregoing facts.)

1. We will first consider and dispose of the questions raised by the defendant's challenge to the array of grand jurors in Walker County.

(a) The Constitution of this State by article 6, section 16, paragraph 2 declares that "The General Assembly shall provide by law for the selection of the most experienced, intelligent, and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. Nevertheless, the grand jurors shall be competent to serve as traverse jurors. The General Assembly shall have the power to require jury service of women also, under such [fol. 65] regulations as the General Assembly may prescribe." Except as to the above last-quoted sentence, the Constitution of 1877 required and provided for the same. As its compliance with this constitutional mandate, the General Assembly has provided for the selection of grand and traverse jurors by a board of six jury commissioners in each county. Code, § 59-101. These jury commissioners are required to revise the jury lists biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter. They must select from the books of the tax receiver upright and intelligent men to serve as jurors, and from these they are required to select a sufficient number, not exceeding two-fifths of the whole number, "of the most experienced, intelligent, and upright men to serve as grand jurors." The entire number as first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county. Code, § 59-106. The Constitution does not require that all upright and intelligent men shall be selected as jurors. It merely fixes the qualification of a juror, and leaves to the General Assembly the question as to whether all such persons or a lesser number shall be selected. The law passed by the General Assembly for the purpose of carrying into effect the constitutional provision respecting the selection of jurors does not require that all persons possessing the constitutional qualification shall be selected. It reposes in the jury commissioners not only the authority to determine what men have these qualifications, but how many of such men shall be selected for

jury duty in the county. Our constitutional demand is for a jury list composed of upright and intelligent men—not that every upright and intelligent man be included in the list—and from this list grand jurors must be selected. Accordingly, it cannot be held that Code § 59-106, which provides for the selection of grand and traverse jurors exclusively from the books of the tax receiver—his tax di- [fol. 66] gest—is violative of our Constitution because it does not also permit the board of jury commissioners to select grand and traverse jurors from among those men who make no tax returns. See, in this connection, Wilson v. State, 69 Ga. 224; Rawlins v. State, 124 Ga. 31 (52 S. E. 1); Davis v. Arthur, 139 Ga. 74 (76 S. E. 676), affirmed in 201 U. S. 638 (26 Supp. Ct. 560, 50 L. ed. 899, 5 Ann. Cas. 783); Cady v. State, 198 Ga. 99 (31 S. E. 2d, 38). Our statute, embodied in § 59-106 of the Code, does not, for the reason assigned, violate section 1 of the Fourteenth Amendment to the Constitution of the United States. Strauder v. West Virginia, 100 U. S. 303 (25 L. ed. 664). In Strauder's case the court said: "We do not say that within the limits from which it is not excluded by the amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th amendment was ever intended to prohibit this." It is not contended in this case that the challenged grand jurors did not themselves possess the required constitutional qualifications.

(b) The Code (Ann.), § 59-101, provides: "There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. . . . The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor: Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners." While conceding the constitutionality of this section of the Code, it is alleged and argued by the defendant that it has been unconstitutionally applied in

the selection of the challenged grand jurors, since no Negro [fol. 67] has ever been appointed to membership on the Walker County board of jury commissioners, but Negroes have been systematically excluded therefrom because of race and color. There is no merit in this. Otherwise, the Supreme Court of the United States would, for the same reason, be disqualified to review the defendant's case should it ever reach that court.

(c) There is no merit in the contention that the challenged grand jurors were incompetent to serve as such because the clerk of the superior court failed to prepare and certify a proper jury list or the jury book which the statute requires him to make out and keep in his office. These grand jurors, presumptively, were drawn regularly from the grand-jury box. There is nothing in the record indicating anything to the contrary; and it is well settled in this State that jurors, legally selected and regularly drawn from the jury box, are not rendered incompetent to serve because of any irregularity in the preparation of jury lists or the keeping of a jury book. Carter v. State, 56 Ga. 463; Crawford v. State, 81 Ga. 708 (8 S. E. 445); Washington v. State, 122 Ga. 735 (50 S. E. 920).

2. In his challenge to the array of traverse jurors in Fulton County the defendant made the same attack upon the constitutionality of Code §59-106, the same charge respecting an unconstitutional application of Code §59-101, and the same complaint respecting the preparation of jury lists and the keeping of a jury book as were made by him in his challenge to the array of grand jurors in Walker County. Those questions are fully dealt with and disposed of in the preceding division of the opinion adversely to the defendant's present contention, and our rulings upon them need not be repeated; it being sufficient to say that they afford no sufficient ground of objection to the array of traverse jurors put upon the defendant in Fulton County. But, as to the remaining questions raised by the defendant's [fol. 68] challenge to the array of traverse jurors in Fulton County, we hold:

(a) There is no merit in the contention that the traverse jurors put upon the accused were incompetent to serve be-

cause the number of colored men selected for traverse jury service was excessively small, and because, in proportion to the numbers of white and colored taxpayers in Fulton County, the respective numbers of white and colored men selected for traverse-jury service were excessively disproportionate, and so much so as to show an arbitrary and systematic exclusion of upright and intelligent colored taxpayers from jury service because of race and color. Jury service is not a right or a privilege, but is a burden which the state summons certain of its citizens to bear, and upon no basis is apportionment of jury duty required by the Constitution, the law, or any decision which we have been able to find. The record shows that Fulton County in 1950 had a total population of 671,797, of which 505,983 were white and 165,814 were colored people; that tax returns were made in 1950 by 105,035 white and 17,736 colored taxpayers of that county; and that the jury commissioners by their last revision of the jury lists placed the names of 20,509 white and 1,115 colored jurors upon the traverse jury list. From this information, unaided by other facts, we cannot say that the jury commissioners have arbitrarily and systematically excluded upright and intelligent colored men from traverse-jury service because of their race and color, as contended. For a more thorough discussion of this question, see Watkins v. State, 199 Ga. 81 (33 S. E. 2d, 325), and the cases there cited and discussed by Mr. Justice Grice, who prepared the opinion for the court. The ruling here made is not in conflict with Crumb v. State, 205 Ga. 547 (54 S. E. 2d, 639).

"(b) In revising the jury lists or jury boxes, the jury commissioners are required to write the name of each person selected for jury duty on a ticket and "place the tickets [fol. 69] containing the names of grand jurors in a box to be provided at the public expense, which box shall contain compartments marked number 'one and two,' from which grand jurors shall be drawn, and the jury commissioners shall place the tickets containing the names of traverse jurors in a separate box, from which traverse jurors shall be drawn." Code, §§ 59-106, 59-108. And while the statute does not say so, its manifest intention is that the tickets shall be of uniform size and color, so as to make discrimination impossible in the drawing of jurors; and, where not so done, this is prima facie evidence of discrimina-

tion, and, if nothing else appeared, would require a reversal. In this case, however, it is not charged or contended that any discrimination was practiced in drawing the challenged jurors; and the judge who drew them, as a witness for the accused, testified there was in fact none. Therefore, the practice of placing the names of white and colored jurors in the jury box on tickets of different colors did no harm in this instance, and consequently furnished no sufficient objection to the jurors challenged by the accused.

3. The first and second grounds of the amendment to the motion for a new trial complain of the court's failure to grant a mistrial, on motion of the defendant's counsel therefor, because while Mrs. Hollingsworth, the prosecutrix, was testifying she stated: "As to what effect the blows on the head had on me, well, I was not addled and I was not knocked out by the blows. I was just nervous and didn't have any hopes of ever getting back in the house to my children alive." Also: "Prior to this intercourse up there at the toilet I struggled all I could against him and he got the best of me. I screamed and hollered, I began hollering before he got me out of the door. I kept on hollering for a good long while. I said, it is James Avery, as hard as I could. I was nervous and torn up and knew that he had already killed." These statements, as the record shows, were made voluntarily by the witness and not in re- [fol. 70] sponse to any question propounded. That they were highly prejudicial was the ground upon which the defendant moved for a mistrial. The court, as to the first statement, said to the jury: "I am going to rule that out, any hopes that she had in the case, anything she testified to about what she hoped. That does not have any place in the case, gentlemen of the jury, and I instruct you not to consider that at all." And, concerning the second statement, the court gave the following instruction: "Gentlemen of the jury, about three minutes ago the witness stated something about the word 'killed.' It was an incomplete sort of incoherent sentence that she spoke. She never did complete that sentence. Now the court instructs you that you are to obliterate altogether from your mind the word 'killed' or anything that may be connected with that word. That incomplete sentence that she was about to utter or was in the act of uttering has absolutely no place at all in the trial of

this case. Now I want to make that clear that the court has instructed you not to consider at all that incomplete statement which the witness was making." It is true that impressions may be sometimes created because of statements volunteered by a witness, which may be of such kind and character that their prejudicial effect cannot be taken away. The trial judge has the responsibility of seeing that the rights of the defendant as well as the rights of the State are protected, and is given broad discretion; and that discretion will not be interfered with except in cases where it is apparent that the prejudice to the defendant has not been removed. In this case we think that the injury complained of was effectively removed by the court's action; and, accordingly, no abuse of discretion is shown. These two grounds of the motion afford no sufficient cause for a new trial.

4. Special grounds 3, 4, and 5 of the motion allege that the court erred in allowing in evidence, over objection, photographs of the head, face, and knees of the prosecutrix, [fol. 71] which were taken, as the evidence shows, on Tuesday after the alleged offense of rape is charged to have been committed on the Sunday night before; and the oral testimony of two witnesses, which was to the effect that the photographs correctly portrayed the scratched and bruised condition of Mrs. Hollingsworth's body at the time they were made. These photographs and the oral evidence objected to were relevant, material, and clearly admissible. It was proper to allow them. See, in this connection, Franklin v. State, 69 Ga. 36 (1) (47 Am. R. 748); Johnson v. State, 158 Ga. 192 (2) (123 S. E. 120); Weaver v. State, 199 Ga. 267 (3) (34 S. E. 2d, 163). To exclude evidence of this character on the ground that it would inflame the minds of the jury, would prevent the State from establishing facts material to the issue. A relevant and material fact is not subject to an objection that it would inflame the minds of the jury.

5. The sixth special ground of the amended motion for a new trial complains of the court's failure to grant a mistrial, on motion of the defendant's counsel therefor, because during the trial and while Mr. Coker was making an argument to the jury for the State, Mrs. Hollingsworth, the prosecutrix, made an outcry in the courtroom, in the presence and hearing of the jury, which allegedly was improper

and highly prejudicial to the defendant's case. As to this, and so far as it need be stated, the record shows:

"The Court: Let me do this, let the court interpose these facts for the purpose of the record. I did hear an audible sound in the courtroom. Mrs. Hollingsworth, the prosecutrix, was sitting on the first bench, I believe that is correct, outside of the railing of the courtroom, and I heard one audible sudden cry, which in my best judgment probably came from her and that was all that I heard, and I immediately sent the jury out upon Mr. Gleason making a motion or intimating that he wanted to make a motion. The jury was then immediately sent out of the courtroom. Now gentlemen, does that fairly and accurately state the situation?"

[fol. 72] "Mr. Davis (The Solicitor-General): Yes."

"Mr. Gleason: I would like to state in my place, or I will be glad to be sworn if the State wants it that way, as counsel for the defendant serving under appointment by the court, that I was seated in my chair during the argument of Mr. Coker, special prosecuting counsel, to the jury; that Mrs. Hollingsworth was seated on the front seat outside of the bar, which I would estimate to be twenty feet from the end of it, which I would estimate to be seventeen feet from the end of the jury box; that Mr. Coker, while waxing eloquent in an oratorical vein with an argument tending to arouse the feelings of an ordinary human being, including perhaps the judge, the jury, and counsel for the defendant, caused Mrs. Hollingsworth to make an audible outcry that was audible to counsel for the defendant as well as the court. I immediately looked around. I noticed that Mrs. Hollingsworth had her hands over her face. She was crying in an audible manner that I heard, seated next to the lady who now appears on the first row of the bench outside the bar; that I looked at the jury and I saw two members of the jury looking at Mrs. Hollingsworth. I immediately got up and made the motion. I'll be glad to be cross-examined on any matter of that statement."

"The Court: You agree the entire incident occurred in a second or two, I think."

"Mr. Gleason: Yes, I think that is a fair statement."

"Mr. Davis: I would like to say for the purpose of the record, and I will be subject to cross-examination, on hear-

ing a slight outcry in the rear of the courtroom, I looked around and the prosecutrix had her hand to her mouth as she did several instances yesterday. That was my view, it might have been sometime after Mr. Gleason's, I don't know."

"The Court: Gentlemen, it is certainly the intent and desire of this court to see that the defendant has a fair and impartial trial as he is entitled to have under the law; however, the court is of the opinion that this slight outburst is [fol. 73] not calculated to and did not, in the opinion of the court, prejudice any of the rights of the defendant in the case so I am going to overrule the motion for mistrial."

"Mr. Gleason: In that connection now, will Your Honor order the prosecutrix to remain out from the hearing in the presence of the jury so there will not be a reoccurrence? Will Your Honor admonish the jury to utterly disregard that outburst on her part?"

"The Court: Yes, I will follow your recommendations in both of those instances, and I am going to require the prosecutrix to remain out of the courtroom. Mr. Sheriff, I want you to be sure she remains out of the courtroom during the remainder of this trial."

"Mr. Gleason: And Brother Shaw (George Paul Shaw, of counsel for defendant) suggests that I ask Your Honor to add to the admonition that the outcry was improper conduct."

The jury was then returned to the courtroom and instructed as follows:

"The Court: Gentlemen of the jury, a few minutes ago in this courtroom there was a slight outcry made on the part of Mrs. Hollingsworth, the prosecutrix in this case. Now the court instructs you that that conduct was highly improper. The court further instructs you that you are to try this case solely from the evidence and from the sworn testimony which has been introduced in the trial of this case, and the defendant's statement. The court instructs you that you are to completely disregard and erase completely from your minds that incident which I have just referred to. That incident has absolutely no place at all in the trial of this case, and I want to make it perfectly clear to each of you

gentlemen on the jury that you are to completely and entirely erase from your minds and memory that incident. I think that is perfectly clear."

It is undeniably the right of every person accused of crime in this State to have a fair and impartial trial, free from [fol. 74] any demonstration or disorder of a nature calculated to affect prejudicially the jurors trying his case. Patton v. State, 117 Ga. 230, 237 (43 S. E. 533). But in the circumstances of this case we are not prepared to say that the refusal of the trial judge to declare a mistrial was erroneous. See Clements v. State, 123 Ga. 547 (51 S. E. 595); Brown v. State, 148 Ga. 264 (96 S. E. 435). Compare Glenn v. State, 205 Ga. 32 (52 S. E. 2d, 319). Motions of this character are addressed to the discretion of the trial judge; and, unless it can be shown that such discretion has been abused and some positive injury done by the occurrence complained of, the discretion of the trial judge will not be controlled. Inman v. State, 72 Ga. 269; Purvis v. Atlanta Northern Ry. Co., 145 Ga. 517 (89 S. E. 571). We are not authorized by the facts concerning the occurrence complained of to say that the trial judge abused his discretion in denying the defendant's motion for a mistrial. To the contrary, we do not think that he did.

6. Error is assigned because the court refused to declare a mistrial on account of certain language employed by Mr. Coker, of counsel for the State, in his argument to the jury, it being alleged that his argument was not authorized by the evidence, and that it prejudiced the minds of the jury against the defendant. The remark complained of was, "We are not going to have our women beaten and you put a stop to this." The motion to declare a mistrial was denied by the trial judge, who directed offending counsel to confine his remarks to the case on trial, the evidence, and the defendant's statement. The remark, allegedly improper, was not of such a character as to require the granting of a mistrial upon the ground that the court erred in refusing a mistrial at the time the remark was made. See Dickerson v. State, 121 Ga. 436 (48 S. E. 942). Accordingly, there is no merit in special ground 7 of the motion.

7. The court charged as follows: "Gentlemen, if you [fol. 73] believe that a crime was committed as charged in

this bill of indictment, but you do not believe that this defendant committed the crime, if you believe such crime was committed, or if you should have a reasonable doubt as to whether he committed the crime, it would be your duty to give him the benefit of the doubt and acquit. In other words, gentlemen, before you could convict this defendant, you must first believe that a crime was committed as charged in the bill of indictment, and you must also believe beyond a reasonable doubt that this defendant is the person who committed that crime. If you have a reasonable doubt as to the defendant's guilt, it is your duty to give him the benefit of that doubt and acquit him." Special ground 8 complains of the court's failure to also give, on written request, the following instruction: "I charge you that on a trial for rape the identification of the accused as the person who committed the offense is of paramount importance and must be established beyond a reasonable doubt." This ground of the motion is without merit. The court is not required to give a requested charge when, as here, it is argumentative in character. Taylor v. Taylor, 195 Ga. 711 (8) (25 S. E. 2d, 506).

8. Error is assigned, in special ground 9 of the amended motion for new trial, on the court's failure to give the following timely requested charge: "I charge you that the credit to be given the testimony of the prosecutrix depends, more or less, on the concurrence of circumstances with her testimony; for instance, if she be of good fame, if she presently discovered the offense, made pursuit after the offender, and showed circumstances and signs of the injury. But if she concealed the injury for any considerable length of time after she had opportunity to complain, if the place where the fact was supposed to be committed was near inhabitants or places of common recourse or passage, and she made no outcry when the fact was supposed to be done, where it is probable that she might have been heard by [fol. 76] others, these and other like circumstances carry a strong presumption that her testimony is false or feigned." In the circumstances of this case, failure to give the requested charge was not error. A request to charge should not be given, though abstractly correct, when not properly adjusted to the facts of the case. Brannon v. State, 140 Ga.

787 (80 S. E. 7); Holton v. State, 137 Ga. 86 (4) (72 S. E. 949); Rouse v. State, 136 Ga. 356 (71 S. E. 667). In this case the defendant offered no evidence, but by his statement sought to set up the defense of alibi. There was no evidence showing or tending to show that the prosecutrix was a woman of bad character, or that she failed to presently discover the offense and pursue her assailant. To the contrary, it appears in substance from the State's evidence: that the accused, at night and while intoxicated, went to the home of the prosecutrix where she and several small children were alone; that he broke open a door, seized the prosecutrix, pulled her out in the yard some short distance from the house, and had intercourse with her forcibly and against her will; that she screamed and hollered at the time of the assault until she was "unable to utter a word;" that her fourteen-year-old son, who was not at home when the accused entered, and a negro man came up while the accused had her on the ground; that the accused then jumped up and ran; that she at that time told her son about the occurrence; that the affair was immediately reported to the officers; that she was carried to a hospital for treatment, her body being badly scratched and bruised; that the accused was arrested during that night, shortly after the assault, and on being brought before her at the place to which she had been carried for treatment was positively identified by her as her assailant. See Teague v. State, 208 Ga. 459 (67 S. E. 2d, 467).

9. The remaining special ground of the motion for new trial alleges that the court erred in failing to charge, without request, upon the defendant's defense of mistaken identity. As to this, the charge as given was sufficient in the absence [fol. 77] of a written request for more specific instructions on the subject. Accordingly, there is no merit in this ground.

10. The verdict is amply supported by evidence, and no reason appears for interfering with the discretion of the trial judge in refusing a new trial.

Judgment affirmed. All the Justices concur, except Atkinson, P. J., and Wyatt, J., who dissent. Head, J., concurs specially.

Head, J., concurring specially. There is neither constitutional nor statutory authority for the use of different colors of paper in placing the names of colored jurors in the jury

box. This practice could serve only one purpose, to wit, discrimination in the drawing of the names of colored jurors from the box. Prima facie such practice is wrong and should be discontinued at the first opportunity to revise the jury list. The testimony of Judge Moore as to the method in which the jurors are drawn is sufficient to show that the defendant was not harmed in this case, since there was no discrimination against colored jurors in the selection of the traverse jurors.

Wyatt, Justice, dissenting. I cannot agree with the ruling in subdivision (b) of division 2, for the reason, in my opinion, that this practice is conclusive evidence of discrimination, and for that reason the case should be reversed.

I am authorized to say that Presiding Justice Atkinson joins me in this dissent.

[fol. 78] In Supreme Court of Georgia

Atlanta.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

James Avery

v.

The State

Judgment—April 14, 1952

This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, except Atkinson, P. J., and Wyatt, J., who dissent. Head, J., concurs specially.

[fols. 79-94] Clerk's Note

Petition for rehearing to Supreme Court of Georgia, filed on the 23rd day of April, 1952 and denied on the 14th day of May, 1952, together with the order of Supreme Court of Georgia denying the same, without opinion. (Omitted in printing.)

[fol. 95] IN THE SUPREME COURT OF GEORGIA

[Title omitted]

PETITION TO STAY THE ENFORCEMENT OF THE JUDGMENT OF THE SUPREME COURT OF GEORGIA IN THE ABOVE STATED CASE—Filed May 15, 1952

To The Honorable W. H. Duckworth, the Chief Justice of the Supreme Court of Georgia:

Now comes James Avery, the plaintiff in error in the above-stated case and files this his petition to stay the judgment of the Supreme Court of Georgia and withhold the issuance of a remittitur to the Superior Court of Fulton County, Georgia, and for grounds thereof alleges:

1

That the plaintiff in error will, within the time provided by law, to wit: Ninety days from the date of the denial of the motion for rehearing (Rule 38½ of the Rules of the Supreme Court of the United States and 28 U. S. C. A., Section 2101(c)), file his petition for writ of certiorari in the Supreme Court of the United States.

2

That the Supreme Court of the United States has jurisdiction to act on such petition when filed by virtue of Title 28, Section 1257, U. S. C. A. and Title 28, Section 2101, U. S. C. A., because Constitutional questions are involved in the case.

3

That a stay of the Enforcement of the sentence and the issuance of a remittitur to the Superior Court of Fulton County may be granted by a Judge of the Supreme Court of Georgia under the provision of Title 28, Section 2101 (f) U. S. C. A.

[fol. 96] 4

That important and heretofore undecided questions are involved in said case. Two Justices of this Court stating

the case should be reversed, with one Justice concurring specially.

5

This application is made in good faith and not for delay.

Frank M. Gleason, of Counsel for Plaintiff in Error.

Gleason & Painter, Attorneys at Law, Rossville, Georgia; Shaw & Shaw, Attorneys at Law; LaFayette, Georgia.

GEORGIA,
Walker County:

Frank M. Gleason, being first duly sworn on oath says that he is of counsel for James Avery, the plaintiff in error, having been appointed as such by the Judge of the Superior Court of Walker County, Georgia; that he verily believes that important and heretofore undecided questions are involved in said case and that a question of sufficient importance is made on constitutional grounds which will justify the filing of an application for certiorari in the Supreme Court of the United States.

Affiant further declares that he and George P. Shaw have served in said case without the payment of any sum whatsoever as attorneys fees solely by virtue of their appointment by the Court as aforesaid.

This 14 day of May, 1952.

Frank M. Gleason, of Counsel for Plaintiff in Error.

Subscribed and sworn to before me this 14 day of May, 1952. Dorothy Seagle, Notary Public. (Seal.)

[fol. 97] Certificate of Service—(omitted in printing).

[fol. 98] IN SUPREME COURT OF THE STATE OF GEORGIA

[Title omitted]

ORDER GRANTING STAY—Filed May 15, 1952

Upon consideration of the foregoing petition, it is hereby granted. The Clerk of this Court is directed to withhold the remittitur in this case for a period of ninety (90) days from May 14, 1952, the date of the denial by this Court of

the motion for a rehearing herein, in order to allow counsel for the petition to prepare and file a petition for the writ of certiorari in the Supreme Court of the United States.

This May 15, 1952.

W. H. Duckworth, Chief Justice, Supreme Court of Georgia.

[fol. 99] IN SUPREME COURT OF GEORGIA

LETTER RE SPECIFICATIONS FOR PRINTING OF RECORD

Frank Milton Gleason, Paul Wain Painter, Andrew W. Cain, Jr., William B. Woods.

GLEASON & PAINTER,
Attorneys at Law
102 Howard Street
Rossville, Georgia.

June 16, 1952.

Miss Katharine C. Bleckley, Clerk, Supreme Court of Georgia, State Capitol, Atlanta, Georgia; Attn: Mr. Henry H. Cobb, Deputy Clerk.

In Re: Case No. 17810

JAMES AVERY

v.

STATE.

Dear HENRY:

Thank you for your letter of June 14th and for the suggestions there made.

I would like the material arranged in the following order:

1. The Indictment and Plea of Not Guilty.

2. The Challenge to the Array of Traverse Jurors filed in the Superior Court of Fulton County, Georgia on September 17, 1951.

3. The Amended Challenge to the Array of Traverse Jurors filed in the Superior Court of Fulton County, Georgia, on September 17, 1951.

4. The State's Demurrer to this Challenge to the Array.
5. The State's Traverse to this Challenge to the Array.
6. The Order of the Judge of the Superior Court, Atlanta, Georgia, sustaining the Demurrer and Motion to Strike.
7. Transcription of the Testimony of George A. Campbell and Mr. J. W. Simmons; the Certificate of the Jury Commissioners contained in the transcript and the Testimony of Judge Moore.
8. The Order of Judge Shaw overruling and denying the Challenge to the Array.
[fol. 100] 9. The Bill of Exceptions Pendente Lite to the Orders sustaining the Demurrer and overruling and denying the Challenge to the Array.
10. Bill of Exceptions.
11. The Opinion of the Court.
12. Judgment (Remittitur).
13. Motion for Rehearing.
14. Order denying Motion.
15. Petition to Stay Transmission of Mandate (Remittitur) to Fulton Superior Court.
16. Order Granting Stay.
17. Specification of Record.

In my letter to you of May 23rd, I overlooked the Indictment, the Order Denying Motion for Rehearing, the Remittitur, Specifications and the Petition to Stay the Transmission of the Remittitur to the Superior Court of Fulton County, Georgia, and Order Granting the Stay.

These additional parts of the record are comparatively short and I am sure you will have no difficulty with the same.

You may consider the above letter as supplementary to my letter of May 23rd.

I do not think it necessary to file a formal specification, because, after all, the foregoing specifies sufficiently what we want in the record.

Thanking you very much for your kindness in calling this to my attention.

With kindest personal regards,

Yours very truly, Frank M. Gleason.

FMG:bhb

[fol. 101] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 102] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 102 Misc

JAMES AVERY, Petitioner,

vs.

THE STATE OF GEORGIA

ORDER GRANTING CERTIORARI—March 9, 1953

On petition for Writ of Certiorari to the Supreme Court of the State of Georgia

On consideration of the motion for leave to proceed herein in *forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 648 and placed on the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 648

JAMES AVERY,

Appellant,

vs.

STATE OF GEORGIA,

Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

FRANK M. GLEASON,
GEORGE PAUL SHAW,
Counsel for Petitioner.

GLEASON AND PAINTER AND A. W. CAIN, JR.,
SHAW AND SHAW,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 648

JAMES AVERY,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James Avery, in support of his petition for a writ of certiorari to review final judgment of the Supreme Court of Georgia, entered April 14, 1952, (opinion set out R. 45-60, also 70 S. E. 2d 716) following which petition for rehearing (omitted from printed record (see Clerk's note, R. 60)) was filed April 23, 1952, and denied May 14, 1952, (R. 60) affirming his conviction for rape under Georgia Code, Section 26-1301 (see note) followed by sentence of death under Georgia Code, Section 26-1302 (see note) which conviction and sentence took place in the Superior Court of Fulton County, Georgia, respectfully shows:

NOTE.—Text of section is set out at conclusion of petition.

A

Summary Statement of Matter Involved

I. GENERALLY

This petition is brought on the issue of whether discrimination against members of the Negro race has been practiced in any phase of the trial procedure by which defendant was convicted and sentenced to death. It is primarily directed to the practice in Fulton County of having the names of White persons in the jury box from which jurors are drawn written on white tickets and the names of Negro jurors in the said box written on yellow tickets, especially in view of the fact that the judge and subordinate court officials are able to observe this fact while the jury is being drawn. It is brought in the light of facts set out in the record, and recognized in the opinion of the Supreme Court of Georgia (R. 39, 46, 47) as to the proportionate numbers of Negro citizens

1. Residing in Fulton County,
2. On the Tax Receiver's digest of Fulton County (from which the jury is selected under Georgia Code, # 59-106 (see note),
3. On the jury list of Fulton County, and
4. On the panels from which the jury was struck that tried James Avery, all of which are shown by the following table, to-wit:

Class of Persons	Number of Persons	Number of White Persons	Number of Negro Persons	Percentage of Negro Persons
Residents of Fulton County	691,797	505,983	165,814	25
On Tax Receiver's Digest of Fulton County	122,771	105,035	17,736	14
On Jury List of Fulton County	21,624	20,509	1,115	5
On Panels from Which Jury was Struck	60	60	0	0

Defendant contends that this result is impossible under a system of fair and indiscriminate selection and that the above mentioned practice evidences and facilitates discrimination.

II. Chronology of the Case

The defendant, a Negro man, was charged with having committed the offense of rape upon, a White woman, Mrs. M. L. Hollingsworth on October 29, 1950 (R. 1). According to the evidence of the prosecutrix, the offense occurred in the evening. He was arrested at 9:00 or 10:00 P. M. that night, taken to jail immediately at LaFayette, Walker County, Georgia, the county seat of the county where the alalleged crime was committed. About 10 minutes after he arrived at the Walker County jail a car with four men in it stopped there. Three got out. One went to the kitchen door. He ran back to the car when he found that the sheriff was waiting for him in the kitchen. The lights were out in the kitchen. They drove off without lights. The sheriff immediately thereafter moved the defendant 30 miles to another jail and a day or so later he was moved to the jail in Atlanta, Georgia. Motion on the ground that there was danger of lynching and that a fair trial could not be had there (for change of venue) was filed on February 21, 1951, and overruled on February 26, 1951. This denial was appealed to the Court of Appeals of Georgia and this judgment was reversed on April 10, 1951, the decision being reported in *Avery* v. *State*, 83 Ga. App. 700, 64 S. E. 2d 589, the foregoing facts being set out in said opinion. Challenge to the array of grand jurors in Walker county was made and overruled (R. 45, 46). Bill of exceptions pendente lite as to the overruling of the challenge was filed on February 21, 1951. Order granting change of venue to the Superior Court of Fulton County, Georgia, was granted (R. 46). Challenge to the array of traverse jurors in Fulton County, Georgia,

was filed on September 17, 1951 (R. 3), as were a traverse to the challenge (R. 11) and a demurrer to it and motion to strike it (R. 10), and, on September 18, 1951, the demurrer was sustained as to part of the charges in the challenge and the remaining grounds of the challenge were overruled after evidence was heard (R. 9, 32).

He was tried from September 17, 1951, through September 20, 1951, and found guilty without recommendation and sentenced on that date to electrocution. Motion for new trial was also filed on that date. Amended motion for new trial was filed on January 11, 1952, and both motions for new trial were denied on that date. The case was then appealed to the Supreme Court of Georgia, bill of exceptions being filed on January 24, 1952. The foregoing facts are set out in the bill of exceptions (R. 35, 37-40). Judgment was affirmed on April 14, 1952, one justice concurring specially and two dissenting (R. 45-60), and motion for rehearing was filed on April 23, 1952, and denied on May 14, 1952 (see Clerk's note, R. 60). Petition to stay remittitur was granted May 15, 1952 (R. 62).

Under the ruling in *Gypsy Oil Company* v. *Escoe*, 48 S. Ct. 112, 275 U. S. 498, 567, and *Morse* v. *United States*, 46 S. Ct. 241, 270, U. S. 151, the date of final judgment was postponed from the date of the original opinion until the date of the denial of the motion for rehearing, said motion for rehearing having been filed within the 10 day period allowed by law (Georgia Code, #24-4544, par. (a) (see note)) and this petition is, therefore, timely in that it is brought within 90 days as provided under Rule 38½ of this court and 28 U.S.C. #2101, par. (c), this being a State criminal case.

III. Summary of the Evidence

Now, let us look to the testimony.

Mr. George A. Campbell, of the Board of Commissioners

Note.—Text of section is set out at conclusion of petition.

who revised the present Fulton County jury list, testified as follows:

> "*Question:* Now, if you have in mind that making the tickets yellow would more easily locate a person, explain why you don't make them all yellow.
>
> "*Answer:* Well, the White people are made on the white tickets and if you make them all alike *you have no way of discriminating,* or, rather, deciding which is white and which is colored." (R. 15, 16)

and testified further:

> "*Question:* Now, let's go into the general experience; let's have your full views about that, please. What did your general experience have to do with placing of names on yellow paper?
>
> "*Answer:* The experience that if you knew whether a man was colored or white when you went looking for him, *it was much easier to eliminate him on account of his color* and look him up where he lived." (R. 17)

Mr. Campbell, in the course of being examined as to why white and yellow tickets were used, said,

> "It has been the custom for fifty years or more to do that and we agreed that would be to a big advantage in locating these people from the lists that they are on, if we knew whether or not they were white or colored. * * * (R. 14, 15)

By the Court:

> "*Question:* I understand you to say for the convenience of locating them?
>
> "*Answer:* That is true. I say we thought further that it would be better to have it that way. As to whether that was the reason for doing it fifty years ago, for the convenience of locating them, I didn't do it fifty years ago. While I am testifying as to the practice and custom and not familiar with why they did it fifty years ago, they might have had a different idea then (R. 15)".

Mr. Campbell testified further on the general subject as follows:

"As to what stage in our procedure that we used the yellow list, well, we started first, I wouldn't swear this, but I think we started on the colored list first, went over that list and took the ones we thought were eligible for jury duty. We took the yellow sheets from the Tax Digest, and we first wrote the names down on white sheets, then when we made the cards for the jury box, we put them on colored cards. In addition to putting the man's name from the Tax Digest on the card or the sheet, we put his address and we got that from the Tax Digest, usually". (R. 17)

"Question: And if you had that information and the address was on there and his name was on that part of the Tax Digest that is required by the Constitution to be yellow, why didn't you just put his name on a white piece of paper with the White folks and put it in the box?

"Answer: For the same reason I just explained to you. When the cards are turned over to the sheriff's office, if he didn't have yellow cards and white cards he wouldn't know whether they were white or black. As to what my duties as a member of the Board of Commissioners had to do with turning over cards to the sheriff's office, well, I didn't turn them over.

"Question: What concern was it of your Board of Commissioners whether or not the Sheriff's office was going to have any difficulty in locating a man?

"Answer: Because I had heard them complain of it.

"Question: You had heard them complain?

"Answer: Yes.

Question: So you merely wanted to be helpful to the Sheriff?

"Answer: Sure." (R. 17, 18)

It appears further from the testimony of Mr. Campbell that Mr. Simmons, Clerk of the Superior Court of Fulton county and ex-officio Clerk of the Jury Commissioners,

turned this list of names over to the printer who printed them on white and yellow tickets, respectively, and that the names were not checked against the original list when they were turned over to the printer. It was admitted that mistakes in printing would be possible. (R. 19)

Mr. Simmons testified that a deputy clerk and not he personally attended to the original typing of the jury list from the tax receiver's digest. He testified specifically:

> "We employed a group of young women assistants who went through these returns and made a card on each return showing the name and address, if the return showed it, the property and so on, and information they took off in condensed form for the jury commission. After they had prepared a number of these cards, the commission would meet and take these cards and study them, the information contained on them, and make a selection. If they selected a certain name, that name was given to Mrs. Truitt who typed it, and she kept in that manner a typewritten list of all the names selected at different meetings of the commission. Now, do you want me to go ahead and complete the story? When the jury commission had completed its work—some few days before they completed the work they told me the approximate number of names that would be in the list, just in round numbers, and I asked the purchasing agent to obtain bids on the printing of these names on tickets. Well, when the list was finally completed, that list of names was furnished to the printer and when the printer returned a proof to the jury commission, and upon the completion of the checking, the proof sheets were sent back to the printer with such corrections, if any, that were made on it, and he then printed those lists. Now, we have in this county three jury boxes. The printer was requested to print four copies of the list, the petit jury; three of those copies were cut up into tickets for the three jury boxes; one copy was retained and placed in this binder. They printed two copies of the grand jury list, one for the grand jury

box and one to be placed in this binder. When the printer notified us that the printing was ready, the jury commission went to the printing office. I went with them and we carried the four jury boxes, the grand jury box, the Superior Court jury box, Civil Court jury box, and box for the Criminal Court of Fulton county, and in my presence and in the presence of the jury commission, these sheets were cut up by cutting them into strips and then cutting this way, making tickets out of them, and these cuttings were placed in the three separate boxes. One grand jury list was cut up in that same manner and put in the grand jury box and this certificate was prepared and one copy of the printing was put in this binder and the certificate attached to it. The young ladies who are employed are in the Commissioners' office, the Jury Commissioners' office. They take in the first instance the tax returns and take off information and make a card for the Board of Jury Commissioners. We have these cards in the office. I don't know whether or not the Board of Jury Commissioners themselves check the information taken by the clerks employed by them from the tax returns turned over by the Tax Receiver. I did not, as Clerk of the Board of Jury Commissioners, ever do it myself (R. 21-23). * * *

"From the cards made up by the clerks, the Jury Commissioners then decide who they will select for jury service. I am not certain whether yellow cards are made by these clerks in taking the names of Negroes off the tax returns or whether they are white. I will have to check them and see. After the Board of Jury Commissioners decide who they will select from the cards prepared by their employees, they make up the list and I take the list to the printer. After the Jury Commission has finished the task of selecting names and set it on a list, we send to the printer a typewritten list of those names. The names that the Jury Commissioners select are the names that appear on the cards taken by these ladies or these clerks who they employ to take the information from the tax returns and the

names are put on a list when they make a selection and taken to the printer and the printer prints the list, but he first makes up a proof which is sent to the Jury Commissioners for verification, and the Jury Commissioners have a copy of the list that they sent to the printer, they make it up in duplicate, make carbon copies of it. Then that list goes back to the printer for printing, the proof sheet that goes back with such changes or corrections as the Jury Commission has made to the printer, and from that corrected list he prints the names that go in the jury boxes.

"I instruct the printer to print the names of the Negroes on the yellow sheets.

"Question: Then actually the address of the man selected, the Negro juror has already been found and determined, he has already been selected, and the yellow sheet doesn't help anyone to locate him at all because he has already been selected; isn't that true, at the time the yellow sheets are made?

"Answer; He has already been selected as a prospective juror.

"Question: Then the fact that his name was put on a yellow sheet wouldn't be of any assistance in helping anyone determine whether he could be located as a prospective juror?

"Answer: Well, that is a problem for the process server. If he knows that man is white or that man is colored, he can locate him easier.

"Question: Does the process server have access to those yellow tickets in the jury box?

"Answer: Nobody has access.

"Question: Then he wouldn't know from the yellow sheet, that wouldn't be of any assistance to him, would it?

"Answer: Well, when a jury is drawn by a judge from the box, if he draws a yellow ticket out, a notation to that effect can be made on the drawn list and he would know it.

"Question: Well, he could make that if it was on a white piece of paper, could do the same thing?

"Answer: Why, certainly, he could make one white and one colored if he wanted to. If the word colored was indicated on the white slip when that name was picked up by the person drawing the jury and read off, there is nothing to prevent the board putting his address under that. I don't know any reason why it couldn't be done. I would think that would serve the same purpose as having a yellow ticket to designate him as a Negro". (R. 23-24)

Mr. Simmons, when on cross examination, testified that he had been Clerk of the Superior Court of Fulton county for 22 years and that an estimated six to eight Negroes were actually impaneled each week that juries were called and that five had served on the grand jury during the preceding term although there were none on the grand jury in service at the time. (R. 25)

Judge Moore of the Fulton County Superior Court testified as to the drawing of the jury as follows:

"The jury box is brought to the judge's chambers in the court room by the Deputy Sheriff and we have a Deputy Clerk who is a young lady and a typist; she comes up and the jury box is unlocked and the seal broken by the judge and the jury is in two divisions, box no. 1 and box no. 2. We take the tickets with the names on them out of No. 1. I don't know how the other judges do but I reach down and pick up maybe two or three or half a dozen tickets and put them in a little box which we have for that purpose. After I get a number in there, say forty or fifty, or something like that, they are turned over to the Deputy Sheriff who turns them over to the Deputy Clerk who makes a typewritten list of them. Those that are put on the list are put back in box no. 2 or *apartment* no. 2, the jury box, and then some more are taken out until we get the required number. We generally draw from 150 to 200 jurors for each division of the court, that is the Civil and Criminal divisions. That is the operation." (R. 28, 29)

. . . . . .

"Question: Now, as you draw the tickets out of compartment no. 1, two or three at a time, do you read the names on those tickets?

"Answer: I do not.

"Question: Do you look on those tickets?

"Answer: Sometimes I do and sometimes I don't." (R. 29)

. . . . . .

"Answer: Well, the Deputy Sheriff, I turn them over to him and he takes them and arranges them and puts them over to the Deputy Clerk.

"Question: No one knows what names you have put in the cigar box (the box referred to in witness' preceding testimony where the tickets are placed while the jury is being selected) until the Deputy Clerk or the Deputy Sheriff gets them arranged, is that it?

"Answer: Well, you would know if you looked at them, I don't know them, I don't really know after they make the list unless I read it over, who is on there; very often I have drawn my own brother and not known he was on it until he appeared here.

"The deputy sheriff puts the names out in front of the typist who is a deputy clerk, so she can type them. He puts every name out before the typist that I draw from the jury box by putting them on her desk, puts them out in front of her, and I am right there when that is going on, and I am there for the completion of the whole process all the way through, the whole time, yes, sir. When the stenographer has copied off the tickets on the list, the deputy puts them in a little cigar box marked No. 2, which is another box which is No. 2 and when they get through copying them, then I take that and put those tickets back in compartment No. 2 of the jury box." (R. 29, 30)

. . . . . .

"Question: Now, Judge Moore, when you draw these tickets out of the panel No. 1 of the jury box, do you ever notice any yellow tickets?

"Answer: Some yellow tickets in there, yes, sir.

"Question: Are those tickets visible to you as you lift the tickets out of the panel No. 1?

"Answer: Yes, sir." (R. 30)

Judge Moore then testified that he did not know any reason for the use of white and yellow tickets other than custom and that the difference in the color of the tickets did not affect him in drawing a jury. He then testified on cross-examination:

"I have been judge of this court—on my twenty-fifth year now. I have petit jurors that are colored here in court. Sometimes we have an entire panel or more. I think it was five colored grand jurors last time here. It is a common practice for both colored and white to serve on the jury. It certainly is, it occurs very often." (R. 31)

And, finally, the testimony on redirect was as follows:

"Question: I don't know whether I made it clear—it is not clear to me—after you draw the name and give it to the typist or the deputy to give to the typist to type, do you make any inspection of the specific name that you have withdrawn from panel No. 1 in the jury box to make sure that the name is copied on the list by the stenographer and the Deputy Clerk?

"Answer: Well, I can't say that I watch every ticket as it is put down; I give it to them and they are there working under my supervision and I suppose if they wanted to slip one in the wastebasket or something they could do it without my seeing it, but I am there supervising and of course a judge can't watch everything." (R. 31)

Now, let us examine the various operations that go into the making of the final jury list from the list of names on the tax receiver's digest, as shown by the testimony herein quoted. It will disclose that there is no substantial conflict on these points:

1. The Board of Jury Commissioners employed clerks to go through the tax receiver's digest and take down the names and addresses and amount of return of the persons on this list on cards. (No specific inquiry was made as to whether the names of all persons on the tax receiver's digest were taken down or not). The Clerk of the Court (and of the Commission) did not recall whether this original list of cards from whom the jury was selected was printed on different colors as to Negroes and White persons, and this matter was not investigated further.

2. The Jury Commissioners went over the cards and selected the names of persons whom they considered eligible for jury service, and gave them to a deputy clerk who typed them. It appears that the Negroes were selected first.

3. The Clerk of the Superior Court secured bids from various printers for the printing of this typed list of names and addresses.

4. The list of names and addresses was returned to the printer and he printed a list and returned a proof to the Board of Jury Commissioners.

5. After the Commissioners checked the list it was sent back to the printer, who printed the final list. The Clerk of the Superior Court personally instructed the printer to print the names of Negro jurors on yellow paper or cards.

6. When the list was printed the jury commissioners took the jury boxes to the printer and cut up the printed list into strips so as to make tickets and placed the tickets in the jury boxes.

The foregoing completed the procedure of preparing the tickets. Let us now summarize the procedure of drawing the jury as testified to by Judge Moore:

1. The jury box is left in the court room by the deputy sheriff. A deputy clerk, who is also a typist, is there.

2. The seal is broken by the judge.

3. The judge reaches down and takes out a few tickets at a time and places them in a box until 40 or 50 are withdrawn.

4. They are turned over to a deputy sheriff who arranges them and turns them over to a deputy clerk. Just what is meant by "Arranging" is not clear from the testimony.

5. The deputy clerk makes a typewritten list, which is the final jury list.

6. The tickets are placed back in the second compartment of the jury box.

IV. The Contentions of Defendant on Appeal

Constitutional objections have been raised to each step in the process of jury selection in both Walker and Fulton Counties by challenge to array in each county, to-wit:

1. The consistent practice throughout the years of having selected White persons only as jury commissioners, both in Walker County (where the grand jury that indicted James Avery was impaneled) and Fulton County (where the traverse jury that convicted James Avery was impaneled); (R. 6, 50, 51)

2. The limitation of jury service to persons on the tax receiver's digest (being an attack on Georgia Code # 59-106 (see note), which requires this method of selection) (this practice reducing the percentage of Negro jurors potentially available from 25 to 14 as shown above); (R. 3-5, 49, 50); and

3. The deliberate and systematic exclusion of a proportionate number of Negro persons whose names appear on the Tax Receiver's list from selection on the jury list on account of their race (this practice being evidenced by reduction of the above mentioned 14 per cent of Negro population available for jury duty according to the Tax Receiver's digest to the above mentioned 5 per cent whose names actu-

Note. Text of section is set out at conclusion of petition.

ally go into the box and who are theoretically available for service. (R. 7, 52)

The record discloses that petitioner contended on these challenges, to which reference is here made, that each and all these matters, separately and cumulatively, constituted an unconstitutional discrimination against defendants of the Negro race in that they resulted in a substantial exclusion of Negro citizens from availability to try other Negro citizens, because of their race, and can only be the result of conscious elimination of a large number and proportion of Negro citizens from availability for this purpose. We do not present these questions as a basic question upon which we rely in this application for certiorari. We do, however, respectfully invite the continued remembrance of the Court of these matters in the consideration of the basic questions that we present, to-wit: the question of whether, after all this has been done, the further practice of writing the names of Negro jurors on yellow tickets and those of White jurors on white tickets and placing these tickets in the box where their color is immediately visible and the race of the person whose name is printed thereon is immediately known to the drawer of the jury before he even places his hand in the box can be other than a sham and fraud to deprive, and make it easily possible for others to deprive, Negro defendants from even having a fair and discriminate selection of citizens of his own race selected for jury service from the remnant left in the box.

B

Statement of the Jurisdiction of This Court

I. Statutory Provisions Believed to Sustain Jurisdiction

The Supreme Court of the United States has jurisdiction of this case under the provisions of 28 U. S. C. Sections 1257 and 2101.

II. Statement of Nature of Case and Rulings of the Supreme Court of Georgia Bringing the Case Within the Jurisdiction of This Court

The nature of this case has already been fully stated. The decision of the Supreme Court of Georgia, which is embraced in the record (R. 45-60) is reported in 70 S. E. 2d 716. We invite the attention of this court to the opinion as a whole, and specifically to the rulings as to the yellow tickets, as follows:

> "And while the statute (Georgia Code, #59-106 (see note)) does not say so, its manifest intention is that the tickets shall be of uniform size and color, so as to make discrimination impossible in the drawing of jurors, and where not so done, this is prima facie evidence of discrimination, and, if nothing else appeared, would require a reversal." (R. 52, 53)

but explains its decision refusing to grant a reversal by saying:

> "In this case, however, it is not charged or contended that any discrimination was practiced in drawing the challenged jurors; and the judge who drew them, as a witness for the accused, testified that there was in fact none. Therefore, the practice of placing the names of white and colored jurors in the jury box on tickets of different colors did no harm in this instance and consequently furnished no sufficient objection to the jurors challenged by the accused." (R. 53)

The concurring opinion stated:

> "There is neither constitutional nor statutory authority for the use of a different color paper in placing the names of colored jurors in the jury box. This practice could serve only one purpose, to-wit, discrimination in the drawing of the names of colored jurors

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Note.—Text of section is set out at conclusion of petition.

from the box. Prima facie such practice is wrong and should be discontinued at the first opportunity to revise the jury list. The testimony of Judge Moore as to the method in which the jurors are drawn is sufficient to show that the defendant was not harmed in this case since there was no discrimination against colored jurors in the selection of the traverse jurors." (R. 59, 60).

and the dissenting opinion stated:

"I can not agree with the ruling in subdivision (b) of division 2 for the reason, in my opinion, this practice is conclusive evidence of discrimination and for that reason the case should be reversed.

"I am authorized to say that Presiding Justice Atkinson joined me in this dissent." (R. 60).

III. Cases Believed to Sustain the Jurisdiction of This Court

Defendant respectfully maintains that the following cases, to-wit:

Crumb v. *State*, 205 Ga. 547, 54 S. E. 2d 639;
Negl v. *Delaware*, 103 U. S. 370, 397;
Norris v. *Alabama*, 294 U. S. 587, 55 S. Ct. 579;
Pierre v. *Louisiana*, 306 U. S. 354, 59 S. Ct. 536;
Hill v. *Texas*, 316 U. S. 400, 62 S. Ct. 1159;
Patton v. *Mississippi*, 332 U. S. 463, 68 S. Ct. 184

sustain the jurisdiction of this Court, together with numerous cases cited therein. For the purposes of this petition, however, defendant will set out only the following excerpts:

Patton v. *Mississippi*, *supra*:

The test of whether there has been discrimination in jury selection in violation of the equal protection clause of the 14th Amendment is (p. 186):

> "Whether there has been systematic racial discrimination by administrative officials in the selection of jurors",

and this case further holds that the answer to this question must be determined (p. 186):

> "from the facts in each particular case"

because (p. 187):

> "When a jury selection plan, whatever it is, operates in such a way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand."

In this connection it is held in *Hill* v. *Texas, supra,* (p. 1162):

> "No state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution and an act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty."

C

Questions Presented

The Jury Commissioners of Fulton County, Georgia (Atlanta) for the past 50 years as one of their official procedural steps in making up a petit jury, have printed the names of White jurors on white slips of paper, and the names of Negro jurors on yellow slips of paper, all of which are placed in a box from which the jury is drawn.

The Judge of the Superior Court when drawing the trial panel from this box has a clear view of the slips before drawing any slip therefrom.

Question 1. Is this practice, inherently and without more, on its face, such a sham and mere device designed and calculated to circumvent the due process and equal protection clauses of the 14th Amendment to the United States Constitution and the State and Federal decisions forbidding discrimination against members of the Negro race in the selection of juries as to invalidate the conviction of a Negro by a jury so selected.

Question 2. Does this practice constitute or result in such discrimination prohibited by the United States Constitution and decisions of the United States Supreme Court and the Supreme Court of the State of Georgia as to invalidate conviction under the facts of the present case.

D

Reasons Relied On for Granting Writ

It will be remembered that under Rule 38, Paragraphs 5 and 5 (a) of this Court, it is provided that:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court."

Defendant respectfully submits that his case comes within the teeth of the foregoing rule, to-wit, that the decision involves a Federal question of substance, which is whether, under the facts, there has been a denial of equal protection of the laws by the State to the defendant in violation of the 14th Amendment by the practices to which reference is

hereinabove made, it being the further contention of the defendant that the case at bar is not in accord with the cases herein cited on the subject. There are special and important reasons for granting this writ in that a man's life is at stake, and that the decision herein will not only determine whether this life is to be forfeited by procedures such as this, but also the lives and liberties of countless other persons of the Negro race who will follow him to judgment by the courts of Fulton County, Georgia.

What other purpose than discrimination, we ask, could the practice serve? What result did it have? Can the fact that not one Negro juror appeared in a panel of 60 be explained on any other basis when Negroes constituted 1 out of 4 of the population, 1 out of 7 on the Tax Receiver's Digest, and even 1 out of the 20 that originally went into the jury box. Can this Court sanction a practice by which a means is provided whereby even the most ignorant could perpetrate a fraud and discrimination, with knowledge of the fact that the final result is such that it can not be sensibly explained by mathematical formulae or coincidence in the absence of discrimination, but can only be explained as a consequence of such discrimination? Can this Court close its eyes to the result in determining the validity of the practice? Can it, above all, sanction the practice in the light of the result?

The statutory provisions as to the functions of the Clerk of the Superior Court with respect to the selection of juries are rather sparse as far as the problems of this case are concerned, and consist of the following language of Georgia Code, #59-104 (see note), to-wit:

"The clerk of the Superior Court shall be the clerk of the Board of Commissioners, and shall perform all the clerical duties required by law."

NOTE.—Text of section is set out at conclusion of petition.

Except for the service of jury summonses, the law of Georgia contains no provision conferring upon the sheriff any duty with reference to the selection or procurement of jurors. Yet a deputy sheriff helped in the drawing of the jury.

Now, it will be observed from the foregoing that there were two main reasons assigned for the practice of using the yellow tickets, to-wit:

1. Custom.

2. To make it easier for the sheriff to locate the prospective juror. These things were confirmed; for all practical purposes, by all witnesses who testified with regard to the subject.

It should be observed, however, that the inadequacy of these explanations was spotlighted by the further testimony of Mr. Simmons (Clerk) that the same purpose could as easily have been effectuated by writing the names of Negro jurors on white tickets with a memorandum of the fact that they were Negroes, because the process server did not even see the yellow ticket but only the name that was taken from it, which was typed on a white sheet of paper with the memorandum that the person to be summoned was a Negro or a White person.

It will be further remembered from the testimony hereinabove quoted that the unguarded truth fell twice from the lips of Jury Commissioner Campbell, in that he stated that the purpose of the yellow tickets was to "discriminate" (R. 16) and "eliminate" (R. 17). Defendant submits that his explanation fell short.

Defendant acknowledges that, had this method of printing tickets been used, and had a substantially similar proportion of Negro persons been found at all places from the Tax Receiver's digest to the final jury panel, the color of the

tickets upon which the respective names were printed would be immaterial, but such is not the case.

All justices of the Supreme Court of Georgia recognized the inherent wrong in the practice, as hereinabove shown. We respectfully submit that it is the duty of this Court to right the wrong.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of Georgia, commanding said Court to certify and send to this Court a full and complete transcript of the record, and the proceedings of said Supreme Court of Georgia in the case numbered and entitled on its docket No. 17,810, JAMES AVERY, appellant, v. STATE OF GEORGIA, appellee, to the end that said case may be reviewed and determined by this Court and that your petitioner may have such other and further remedies as this Court may deem appropriate and that the said judgment of said Supreme Court of Georgia may be reversed by this honorable Court.

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APPENDIX

TEXT OF STATUTES CITED

GEORGIA CODE, # 26-1301

"Rape is the carnal knowledge of a female, forcibly and against her will."

GEORGIA CODE, # 26-1302

"The crime of rape shall be punished with death, unless the defendant is recommended to mercy by the jury, in which case the punishment shall be for not less than one nor more than 20 years."

GEORGIA CODE, # 59-106

"Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as traverse juror, such name shall be returned to the box and another drawn in its stead."

GEORGIA CODE, # 59-104

"The clerk of the superior court shall be the clerk of the board of commissioners, and shall perform all the clerical duties required by law. Before entering upon the per-

formance of his duties as clerk of said board he shall take an oath, before the ordinary, to faithfully discharge his duties as required by law, and that he will never divulge any of the proceedings and deliberations of the jury commissioners, unless compelled to testify thereof in some court in this State."

GEORGIA CODE, # 24-4544, PAR. (a)

(a) The Court may by special order in any case direct that the remittitur be transmitted to the clerk of the trial court immediately after the rendition of the decision and judgment, or at any other time, without awaiting expiration of the usual period of 10 days, and may otherwise by special order limit the time within which a motion for rehearing may be filed to any period less than 10 days, counsel in such cases to be notified. Unless an extension of time is requested and granted, a motion for rehearing must in any event be filed within 10 days from the rendition of the decision and judgment, regardless of whether the remittitur has been transmitted to the lower court.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 648

JAMES AVERY, *Petitioner*,

versus

STATE OF GEORGIA, *Respondent*

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of Court Below

The opinion of the Court below, the Supreme Court of Georgia, *James Avery* v. *State of Georgia*, Case No. 17, 810, filed April 14, 1952, now set out as R. 45-60, is now reported as 70 S. E. 2d 716.

Jurisdictional Statement

The judgment of the Supreme Court of Georgia was entered April 14, 1952. Petition for rehearing was filed April 23, 1952, and denied May 14, 1952. Jurisdiction of this Court rests on Sec. 1257, Title 28, U. S. C., and Sec. 2101, Title 28, U. S. C.

Questions Presented

The jury commissioners of Fulton County, Georgia, (Atlanta) for the past 50 years as one of their official proce-

dural steps in making up a petit jury, have printed the names of White jurors on white slips of paper, and the names of Negro jurors on yellow slips of paper, all of which are placed in a box from which the jury is drawn.

The Judge of the Superior Court when drawing the trial panel from this box has a clear view of the slips before drawing any slip therefrom.

Question 1: Is this practice, inherently and without more, on its face, such a sham and mere device designed and calculated to circumvent the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and the State and Federal decisions forbidding discrimination against members of the Negro race in the selection of juries as to invalidate the conviction of a Negro by a jury so selected?

Question 2. Does this practice constitute or result in such discrimination prohibited by the United States constitution and decisions of the United States Supreme Court and Supreme Court of the State of Georgia as to invalidate conviction under the facts of the present case?

Statutory and Constitutional Provisions Involved

GEORGIA CODE, # 59-101:

> "There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the Superior Court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time in his discretion, for cause, and appoint a successor: Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners."

GEORGIA CODE, # 59-104:

"The clerk of the superior court shall be the clerk of the board of commissioners, and shall perform all the clerical duties required by law. Before entering upon the performance of his duties as clerk of said board he shall take an oath, before the ordinary, to faithfully discharge his duties as required by law, and that he will never divulge any of the proceedings and deliberations of the jury commissioners, unless compelled to testify thereof in some court in this State."

GEORGIA CODE, # 59-106:

"Biennially, or if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

"The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

GEORGIA CODE, # 59-108:

"The jury commissioners shall place the tickets containing the names of grand jurors in a box to be provided at the public expense, which box shall contain compartments marked number "one" and "two", from which grand jurors shall be drawn, and the jury com-

missioners shall place the tickets containing the names of traverse jurors in a separate box, from which traverse jurors shall be drawn."

GEORGIA CODE, # 59-109:

"The clerk of the superior court shall make out, in a book, lists of the names respectively contained in the grand jury box and in the traverse jury box, alphabetically arranged, and place the book in his office, after the lists therein have been certified by the clerk and commissioners to contain, respectively, all the names placed in the jury boxes."

GEORGIA CODE, # 59-203:

"The judges of the superior courts, at the close of each term, in open court, shall unlock the box, and break the seal, and cause to be drawn from compartment number "one" not less than 18 nor more than 30 names to serve as grand jurors at the next term of the court; all of which names shall be deposited in compartment number "two"; and when all the names shall have been drawn out of compartment number "one", then the drawing shall commence from compartment number "two", and the tickets shall be returned to number "one" and so on alternately; and no name so deposited in the box shall, on any pretense whatever, be thrown out of it, or destroyed, except when it shall be satisfactorily shown to the judge that the juror is dead, removed out of the county, or otherwise disqualified by law."

GEORGIA CODE, # 59-701:

"Petit juries shall be selected, and their names placed in a box, as provided in sections 59-106 and 59-108. At the same time, and in the same manner, that grand juries are drawn, the judge of the superior court shall draw out of the same compartment of the jury box 36 names to serve as petit jurors for the trial of civil and criminal cases; and such petit jurors shall be sum-

moned in the same manner as is provided in section 59-206 for summoning grand jurors."

GEORGIA CODE, # 59-206:

"Within 30 days after the grand jurors shall have been drawn by a judge of the superior ocurt, and within five days after they may have been drawn by the ordinary and commissioners, as provided in section 59-205, the clerk of the superior court shall issue and deliver to the sheriff, or his deputy, a precept containing the names of persons drawn as grand jurors; and upon the receipt of the precept, the sheriff or his deputy shall cause the persons whose names are therein written to be served personally, or by leaving the summons at their most notorious places of residence, at least 10 days prior to the term of the court the jurors were drawn to attend."

GEORGIA CODE, # 59-703:

"The judges of the superior courts, at each term, shall, from the petit jurors, have made up two panels of 12 jurors each, which shall be known and distinguished as panels "number one" and "number two"; all cases in said courts shall be tried by one or the other of said panels if the parties shall agree upon a panel. If the parties shall not agree upon a panel, the clerk shall furnish the parties or their attorneys a list of both panels, from which the parties or their attorneys may strike alternately until there shall be but 12 left, which shall constitute the jury to try the case. In all cases the plaintiff shall have the first strike."

GEORGIA CODE, # 59-801:

"When any person shall stand indicted for a felony, the court shall have impaneled 48 jurors, 24 of whom shall be taken from the two panels of petit jurors, from which to select the jury. When the regular panels of petit jurors, or either of them, cannot be furnished to make up panels of 48 for the trial of felonies, because

of the absence of any of such panels, where they, or any part of them, are engaged in the consideration of a case, the presiding judge may cause the panels to be filled by summoning such numbers of persons, who are competent jurors, as may be necessary to make full the said panels. If the jury shall not be made up from said panel of 48, the court shall continue to furnish panels, consisting of such number of jurors as the court, in its discretion, may think proper, until a jury shall be obtained. In making up said panel of 48 jurors, or successive panels of any number, the presiding judge may draw the tales jurors from the jury boxes of the county and order the sheriff to summon them."

GEORGIA CODE, # 59-802:

"The clerk shall make out three lists of each panel, and furnish one to the prosecuting counsel and one to the counsel for the defense. The clerk shall then call over the panel, and it shall be immediately put upon the accused."

GEORGIA CODE, # 59-803:

"The accused may, in writing, challenge the array for any cause going to show that it was not fairly or properly impaneled, or ought not to be put upon him; the sufficiency of which challenge the court shall determine at once. If sustained, a new panel shall be ordered; if not sustained, the selection of jurors shall proceed."

GEORGIA CODE, #2-5102: (Constitution of Georgia of 1945, Art. VI, Sec. XVI, Par. II):

"The General Assembly shall provide by law for the selection of the most experienced, intelligent, and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. Nevertheless, the grand jurors shall be competent to serve as traverse jurors. The General Assembly shall have the power

to require jury service of women also, under such regulations as the General Assembly may prescribe."

GEORGIA CODE, #26-1301:

"Rape is the carnal knowledge of a female, forcibly and against her will."

GEORGIA CODE, #26-1302:

"The crime of rape shall be punished with death; unless the defendant is recommended to mercy by the jury, in which case the punishment shall be for not less than one nor more than 20 years."

GEORGIA CODE, #27-2502:

"The jury in their verdict on the trial of all cases of felony not punishable by life imprisonment shall prescribe a minimum and maximum term, which shall be within the minimum and maximum prescribed by law as the punishment for said crime, and the judge in imposing the sentence shall commit said convicted person to the penitentiary in accordance with the verdict of the jury. The Prison Commission shall fix rules by which said convict, after serving the minimum sentence, may be allowed to complete his term without the confines of the penitentiary upon complying with said rules."

UNITED STATES CONSTITUTION, AMENDMENT 14:

"Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

The issues presented in this case have largely been set out in the petition for certiorari. Attention is again called to the fact that, out of a Negro population in Fulton County, Georgia, comprising 25 per cent of the whole, only 14 per cent were legally available to serve on juries in the first instance because of the statutory requirement that the jurors be taken from the list of names on the Tax Receiver's books. This percentage is reduced further to five when the names of jurors, which are put in the box from which juries are drawn, are selected from the Tax Receiver's books, by the jury commissioners. No Negro person has ever served as a jury commissioner in Fulton County, where Atlanta is located.

The jury is selected from this five per cent of Negroes and 95 per cent White persons and then the Negroes' names are placed on yellow tickets to distinguish them from the White persons' names which are printed on white tickets. In the course of handling this five per cent from the time that the jury commissioners finish with it until the time that the jurors are selected to try cases the names of the prospective jurors are handled by printers, deputy clerks, and deputy sheriffs, in addition to judges and jury commissioners. (See petition for certiorari.)

Now, it never has appeared from the record how these particular panels of jurors happened to come up at this particular time, so that not one out of sixty would be a Negro, assuming that even the entire five per cent were actually in the box. The use of tickets of different colors in this manner facilitates, among other things, the grouping of Negroes' names so that panels of Negro jurors or panels with a large number of Negro jurors may come up in a few specified cases so that lip service may be rendered to the constitutional provisions against discrimination even to the extent of actually drawing the five per cent of Negroes for

jury service but making it possible so to arrange them that their names would come up in groups which would be immediately identifiable to the clerk in actually furnishing the trial panels so that he could see which panels actually contained Negroes and could see that those panels came up in trivial cases and that in a case of importance involving a Negro and a White person they would not come up.

We are not saying that this is what necessarily happened but it certainly could have happened, as the clerk, in typing the list drawn by the judge, or the deputy sheriff who gave them to the deputy clerk who typed the final list of jurors; could easily have so arranged them. Judge Moore did testify, it will be recalled, that one deputy did "arrange" them. (R. 29). The very fact that, as the judge testified, a jury panel of 12 sometimes contained several Negroes, and that even an entire panel of them occasionally came up (R. 31), indicates that they were so grouped, for the reason that, by the laws of mathematical probability, they would seldom, if ever, come up in groups of more than two or three in any *dozen* jurors, but that two or three Negroes would almost certainly come up in any group of *sixty* jurors. It is plain, of course, that any grouping of this small number of Negroes into a few panels would necessarily cause the great majority of panels to consist of White persons only, so that it would be simple for such panels to be selected in a case of this sort. It would necessarily be harder to do that if all tickets were alike.

The premise for which we insist is that, while the means by which discrimination may be practiced in the selection or arrangement of Negroes in connection with jury duty are as devious as the machinations of the human mind, and while the writing of the names of Negro jurors on tickets similar to those upon which the names of White jurors are written would not necessarily eliminate the practice, yet

until the final result of the jury selection discloses as a mathematical fact that discrimination is not practiced, each method or device that aids or facilitates the possibility of such discrimination must be summarily invalidated.

Argument

I. Georgia Jury Procedure Summarized

This portion of the argument is not argumentative in nature, but consists of a summary of the contents of the applicable statutes of Georgia relating to jury procedure, in the hope that a view of the jury picture as a whole will be of assistance to this Court in determining the issues of the present case. The text of the Georgia Code provisions hereinafter summarized is set out, *supra*, under the heading "Statutory and Constitutional Provisions."

Both grand and traverse jurors in each county are selected by a board of six jury commissioners appointed by the grand jury, with six year terms, two of whose terms expire each two years. (Georgia Code, #59-101). The Clerk of the Superior Court, ex-officio, performs their clerical duties. (Georgia Code, #59-104). The law provides that they revise the jury list every 2 or 3 years; that they select jurors from the tax receiver's books; that they write the names of "upright and intelligent" men on tickets; that, then, from the names on these tickets, they write not over two fifths of the total number on other tickets and that the persons whose names are last written be grand jurors; that these grand jurors be selected from the "most experienced, intelligent, and upright" men contained in the first list; and that the entire first group continues to be petit jurors (Georgia Code, #59-106, #59-701). The law then requires the jury commissioners to place the tickets containing the names of grand jurors in a box with two compartments marked "one" and "two", and those containing traverse jurors in another box (Georgia Code, #59-108, #59-701). It is then the duty

of the clerk to make out in a book lists of the names contained in the grand jury box and the traverse jury box, alphabetically arranged, and to place the book in his office after the lists have been certified by him and the commissioners to contain all the names in each respective jury box (Georgia Code, #59-109).

Both grand and traverse jurors are required to be drawn by judges of the superior courts at the close of each term in open court by removing tickets from compartment No. 1 of their respective box and placing them in compartment No. 2 until compartment No. 2 is filled and then drawing them from compartment No. 2 and placing them back in Compartment No. 1, and so on alternately (Georgia Code, #59-203, #59-701). The clerk prepares a precept or summons for all jurors so drawn, and gives it to the sheriff for service either personally or at the most notorious place of abode of each juror (Georgia Code, #59-206).

The panel to try the case contains 48 jurors in capital felonies (Georgia Code, #59-801) and the Clerk of the Superior Court furnishes a list from which they are selected unless a panel is agreed upon between the parties. The clerk furnishes such additional panels as in his discretion is necessary (Georgia Code, #59-801).

Three copies are made of each panel, one for the prosecution, one to the defense, and one for the clerk, who calls out the names of the jurors in the court who are put upon the accused (Georgia Code, #59-802). The accused has the right to challenge the array by showing that it was not fairly or properly impaneled or ought not to be put upon him. The validity of the challenge is determined by the court (Georgia Code, #59-803).

This, briefly, is the substance of the Georgia system of jury procedure, in so far as it pertains to this case. The only pertinent provision of the Georgia constitution states that the General Assembly should provide for the selection

of the most upright and intelligent men as grand jurors and upright and intelligent men as traverse jurors (Georgia Code, #2-5102).

II. Georgia Law of Rape

Rape is the carnal knowledge of a woman, forcibly and against her will (Georgia Code, #26-1301). It is a felony punishable by death unless the defendant is recommended to mercy, in which case the penalty is set within the limits of 1 to 20 years (Georgia Code, #26-1302). In rape, as in other felony cases where the sentence is less than life imprisonment, the sentence, which provides for a maximum and minimum term of years, is fixed by the jury (Georgia Code, #27-2502).

III. State and Federal Decisions Forbidding Discrimination in Jury Selecton

The Supreme Court of Georgia, itself, has recognized and applied the principle that there must be no racial discrimination in the selection of a jury. In the case of *Crumb* v. *State*, 205 Ga. 547, 54 S. E. 2d 639, the facts presented a clear case of prima facie discrimination, to-wit, that Negroes constituted more than 50 per cent of the population, and approximately 33 per cent of the persons on the tax digest, and that no Negroes had served on the jury for 30 or 40 years. The Supreme Court of Georgia, after reviewing various cases decided by this court which will be hereafter discussed, stated, on page 551:

> "It became the duty of the State to justify such an exclusion as having been brought about for some reason other than racial discrimination."

and, further, on page 552:

> "And whatever may be the individual opinion of the members of this court as to the correctness, sound-

ness, or wisdom of these decisions, it becomes our duty to yield thereto, just as the other courts of this state must accept and be controlled by the decisions and mandates of this court. This being a government by law and not by men, the jury commissioners, in their official conduct are bound by the foregoing rulings of the Supreme Court of the United States, notwithstanding any personal opinion, hereditary instinct, natural impulse, or geographical tradition to the contrary."

The substance of petitioner's contentions is that it failed properly to apply the above quoted principles in the present case. Petitioner recognizes the fact that, as stated on page 550, each case must be decided upon its own particular facts, but respectfully contends that the discrimination in this case, while a little less obvious, is no less certain.

The case of *Neal* v. *Delaware*, 103 U. S. 370, makes it plain on page 394 that discrimination, not necessarily involving absolute exclusion, on account of race in jury selection, is the evil to be corrected. The language of the Court is:

"A denial upon their (state officers') part, of his right to a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress. As said by us in *Virginia* v. *Rives*, supra, 'The court will correct the wrong, will quash the indictment, or the panel; or, if not, the error will be corrected in a superior court,' and ultimately in this court upon review.

"We repeat what was said in that case, that while a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as a matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, 'that in the selection

of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.' "

On page 397 of the same case it is said:

"The showing thus made, including, as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of this State,—although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand,—presented a prima facie case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the state court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State; and the refusal of the state court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United State. Speaking by Mr. Justice Strong, in Ex Parte Virginia, we said, and now repeat, that 'a State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional in-

hibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the state, this must be, or the constituional prohibition has no meaning.' "

This was a case involving an alleged rape by a Negro man upon a White woman.

In Ex Parte Virginia, 100 U. S. 339, it was held that (p. 345):

> "the Fourteenth Amendment secures, among other civil rights, to colored men, when charged with criminal offense against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color. We held that immunity from any such discrimination is one of the equal rights of all persons, and that any witholding it by a State is a denial of the equal protection of the laws, within the meaning of the Amendment."

This involved the situation where a Federal statute making the deliberate exclusion of Negroes from juries a misdemeanor offense as against the officer charged with selecting them was held to be constitutional. It will be observed from this case also that discrimination amounts to failure or lack of "indifferent selection" not necessarily amounting to total exclusion.

Likewise, at the same term of the United States Supreme Court, the case of *Virginia v. Rives*, 100 U. S. 313, pointed out that it would be in violation of the Fourteenth Amendment (p. 322):

> "If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty

it is to take the twelve names from the box rejects all the colored jurors for the same reason,—it can with no propriety be said that the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We can not think such cases are within the provisions of section 641. Denials of equal rights in the action of the judicial tribunals of the state are left to the revisory powers of this court."

This case held that the above mentioned section 641 (section 641 of the Revised Statutes), which was a former Federal statute authorizing removal of civil or criminal proceedings to a Federal court where a person could not enforce a legal right in the tribunals of his state because of race, was not applicable to an attempt to remove in the instant case, it appearing that the above enumerated rights were enforcible under the laws of Virginia. This was trial of two Negroes for murder.

Strauder v. *West Virginia*, 100 U. S. 303, was tried at the same term, also, and involved the holding unconstitutional of a statute excluding persons of the Negro race from jury duty. The beneficent purpose of the Fourteenth Amendment can not be better expressed than it is on page 306 of this case:

"At the time when they (the provisions of the Fourteenth Amendment) were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some states laws making such discriminations then

existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States in the states where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by White persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States."

We submit that the facts of the case at bar demand a reversal in the light of the benign and liberal spirit which must govern the application of the law in the light of the foregoing holding. The fact that the discriminaton was practiced in that case by statute and in the case at bar by administrative practice, we respectfully submit, is immaterial. Does not the following additional language on page 307 confirm this:

"What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?"

Was it not held in *Yick Wo* v. *Hopkins*, 6 S. Ct. 1064, 118 U. S. 356, that constitutional administration of laws was as important as the enactment of constitutional laws?

Now, it is further said on page 308 of the Strauder case, supra:

"The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

In this connection, similar comment might be made to the cumulative practices which result in the total absence of Negroes from a trial panel of 60 persons even though Negroes constituted 25 per cent of the total population and 14 per cent of those on the tax digest.

In *Norris* v. *Alabama*, 294 U. S. 587, 55 S. Ct. 579, 580, another Negro rape case, it was said:

"And although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the state through its administrative officers in effecting the prohibited discrimination."

The case of *Carter* v. *Texas*, 177 U. S. 442, 20 S. Ct. 687, as quoted in the *Norris* case, *supra*, on page 580, held:

"'Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him; contrary to the Fourteenth Amendment of the Constitution of the United States'".

The question involved in the case at bar, as in the *Norris* case, *supra*, p. 580, is:

"The application of this established principle (prohibiting discrimination by administrative officers) to the facts disclosed by the record."

The Court further said, there:

"That the question is one of fact does not relieve us of the duty to determine whether in truth a Federal right has been denied. When a Federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also *whether it was denied in substance and effect* (Italics ours). If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, *whenever a conclusion of law of a state court as to a Federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured* (Italics ours)."

That is what we ask this Court to do, to *analyze the facts about the jury selection from the beginning.* We submit that the analysis of the Supreme Court of Georgia was wrong, and that the defendant's life is forfeit as a result.

It should be remembered that, in the *Norris* case, only 6.5 per cent of the population were Negroes, whereas, in the case at bar, 25 per cent were.

In *Pierre* v. *Louisiana*, 59 S. Ct. 536, 306 U. S. 354, we have another case of almost complete exclusion of Negroes. The case of *Hill* v. *Texas*, 316 U. S. 400, 62 S. Ct. 1159, held, on p. 1161:

"Chance or accident could hardly have accounted for the continuous omission of Negroes from the grand jury lists for so long a period as 16 years or more. * * * Discrimination can arise from the action of commissioners who exclude all Negroes whom they do not

know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve."

We respectfully submit that chance could not have accounted for the total absence of Negroes from the panel that tried James Avery.

Other cases in which this Court has applied this vital principle that there shall be no discrimination because of race in the selection of juries have been *Thomas* v. *Texas*, 212 U. S. 278, 282, 283, 29 S. Ct. 393; *In re Wood*, 140 U. S. 278, 285, 11 S. Ct. 738; *Rogers* v. *Alabama*, 192 U. S. 226, 231, 24 S. Ct. 257; *Hale* v. *Kentucky*, 303 U. S. 613, 616, 58 S. Ct. 753; *Gamble* v. *Texas*, 311 U. S. 128, 61 S. Ct. 164. We feel it needless to elaborate on their specific language.

Conclusion

It is respectfully submitted that a writ of certiorari to the Supreme Court of Georgia should be granted, and the conviction reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 648

JAMES AVERY,

Petitioner,

vs.

THE STATE OF GEORGIA

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 648

JAMES AVERY,

Petitioner,

vs.

THE STATE OF GEORGIA

SUPPLEMENTAL BRIEF OF PETITIONER

Section I. Introductory Statement

This supplemental brief is prepared for two purposes:

(1) A comparison of the (Avery) case at bar with the major case decided by the United States Supreme Court on the subject since the preparation of the petition for certiorari, to-wit, *Brown* v. *Allen* (and companion cases), 73 S. Ct. 397. (It will be remembered by this Court that the above styled (Brown) case also involved several companion cases which were combined and treated simultaneously with the case of Brown in the same opinion, including the case of *Speller* v. *Allen*. For the purpose of convenience, under Section II of this supplemental brief, references to both cases, because of their great number, will

be made by setting out, in parentheses, the page number of the said combined opinion where the matter referred to appears, following the abbreviation "Id.", as follows: "(Id., p. ———)").

(2) Rebuttal of the brief of the State of Georgia in reply to petition for certiorari.

Each of these matters will be treated in a separate division of this brief, properly entitled.

Section II. Comparison of Brown and Speller Cases With (Avery) Case at Bar

	Brown	Speller	Avery (at bar)
I. Offense	Rape (Id., p. 412)	Rape (Id., p. 417)	Rape
II. Race of Defendant	Negro (Id., p. 412)	Negro (Id., p. 417)	Negro
III. Question Involved	Discrimination in jury selection on account of race (inter alia) (Id., p. 412)	Discrimination in jury selection on account of race (inter alia) (Id., p. 417)	Discrimination in jury selection on account of race
IV. Method raised in State Court	Motion to quash and motion to set aside verdict (method of raising held sufficient) (Id., p. 412)	Motion to set aside array of special veniremen (method of raising held sufficient) (Id., p. 417)	Challenge to array (method of raising held sufficient)
V. Method brought to United States Supreme Court	Certiorari to United States Circuit Court of Appeals, Fourth Circuit (Id., p. 402)	Certiorari to United States Circuit Court of Appeals, Fourth Circuit (Id., p. 402)	Certiorari to Supreme Court of Georgia
VI. Intervening proceedings between consideration by State Supreme Court and grant of certiorari by United States Supreme Court	Certiorari to State Supreme Court denied by United States Supreme Court and habeas corpus brought in United States District Court and Appealed to United States Circuit Court of Appeals (Id., p. 402)	Same as Brown case (Id., p. 402)	None

VII. *Grounds of attack* (A proper analysis and comparison of the grounds of attack in each of the three cases under consideration can not be readily made in parallel columns like the above. However, such analysis will be continued in accordance with what appear to us to be the five major

bases of comparison, which will be treated separately under subheadings entitled and designated as follows: (a) selection from tax digest (b) past practices (c) comparative population (d) selection procedure (e) identification of Negroes as such during selection procedure).

(a) Selection from tax digest

The manner of selection in each of the respective cases is set out in detail in part (d) of this subdivision VII. We desire, however, to call the attention of the Court to the fact that this brief is prepared under full realization of the rule that (Id., p. 416):

> "We do not think a use, nondiscriminatory as to race, of the tax lists violates the Fourteenth Amendment, nor can we conclude on the evidence adduced that the results of the use require a conclusion of unconstitutionality.",

and that this rule was reiterated as to petitioner Speller (Id., p. 419).

(b). Past practices

"Former errors cannot invalidate future trials" (Id., p. 418)..

While there had been a statutory history of discrimination in both the Brown and Speller cases in the Counties where each was tried (Id., pp. 414, 418), it is carefully explained upon the above stated pages and the pages immediately preceding and following them that there had been a substantial change both in the law and in the results of the selection procedure as to the comparative numbers of White and Negro persons in the respective Counties, which resulted in a great increase in the number of Negroes called to jury service. On the other hand, in the present case, the

practices now followed are the same as they have been for the past 50 years (R. 15). Accordingly, as the former practices are evidentiary in nature (Id., p. 419) and are only material in the light of what they may indicate as to the practice in any given case at bar (Id., p. 419), it was not material in the Brown and Speller cases (Id., pp. 412, 419), but is vitally important in the instant case, which is substantially parallel to the cases cited in the original petition and brief, but not to the Brown and Speller cases.

(c) Comparative population

(The following tables show the comparative numbers and percentages of White and Negro persons in the respective counties involved in the Brown and Speller cases and this case at the various stages in the process of selecting a jury down to the final venire from which the jury was selected, in so far as the facts are available in each case.)

(A) Brown case

1. Population according to the 1940 census (Id., p. 412):

	Population	Per cent	21 plus	Per cent
White	85,323	67.5	50,469	66.5
Negro	41,152	32.5	25,057	33.5
	126,475	100.0	75,556	100.0

2. Persons on 1948 poll tax digest (Id., p. 413):

	Male Population in Winston Township	Per cent	Male Population outside Winston Township	Per cent	Total	Per cent
White	7,659	73.8	10,319	94.6	17,978	84.5
Negro	2,752	26.2	587	5.4	3,339	15.5
	10,411	100.0	10,906	100.0	21,317	100.0

3. Grand jurors summoned (Id., p. 413):

	Number	Per cent
White	55 or 56	93-1/3 or 91-2/3
Negro	4 or 5	6-2/3 or 8-1/3
	60	100

4. Grand jurors finally chosen (Id., p. 413):

	Number	Per cent
White	17	94.5
Negro	1	5.5
	18	100.0

5. Petit jurors summoned (Id., p. 413):

	Number	Per cent
White	29	78.4
Negro	8	21.6
	37	100.0

6. Special venire from which petit jury was finally chosen (Id., p. 413):

	Number	Per cent
White	17	85
Negro	3	15
	20	100

7. Usual percentages of grand and traverse jurors drawn (Id., p. 414):

	Grand	Traverse
White	Between 93 and 90	Between 91 and 83
Negro	Between 7 and 10	Between 9 and 17
	100	100

(B) Speller Case

1. Persons on tax digest (Id., p. 419):

	Number	Per cent
White	5,097	62
Negro	3,136	38
	8,233	100

2. Persons in jury box (Id., p. 418):

	Number	Per cent
White	1,981	93
Negro	145	7
	2,126	100

3. Persons drawn on special venire (*Speller* v. *Crawford*, 99 F. Supp. 92, 97):

	Number	Per cent
White	93	93
Negro	7	7
	100	100

4. Jurors actually summoned, from which jury was finally chosen (*Speller* v. *Crawford, supra*, p. 97):

	Number	Per cent
White	59	93.7
Negro	4	6.3
	63	100.0

(C) This case

The facts and figures with reference to this case are tabulated on p. 2 of petition for certiorari, reference to which is here made, and will not be repeated here.

(d) Selection procedure

A. Brown case

1. All males between 21 and 50 years of age are required to list themselves for poll tax as well as to list their property (Gen. Stat. N. C. #105-307, 105-341, 307-341) (Id., p. 412).

2. A list of names is compiled by designated county officials consisting of all county property and poll taxpayers who make returns. Both grand and traverse jurors are drawn from this list (Id., p. 413).

3. This list is tendered to the County Commissioners for use in jury selection. In this connection, it should be observed that this list contained 40,000 names and that it was a complete compilation without regard to the race of the persons thereon (Id., p. 413).

4. That the list was cut into tickets of uniform size, each containing one person's name (Id., p. 413).

5. The tickets are placed in a jury box (Id., p. 413).

6. The names of both grand and traverse jurors are drawn by a small child in public and recorded there (Id., p. 413).

7. Grand jurors are drawn and selected from this list in January and July of each year for a six-month term in panels of 60 persons. This drawing is also made by a child. It is made in the presence of the County Commissioners (Id., p. 413).

8. A jury order containing the names of these persons is prepared and given to the Sheriff (Id., p. 413).

9. The sheriff summons all persons on the list whom he can find (Id., p. 413).

10. The names of the persons summoned are placed in a special section of the jury box (Id., p. 413).

11. An 18-man grand jury is drawn from this list. This drawing is made by a child in the presence of the Superior Court judge (Id., p. 413).

12. The names of the persons not drawn are placed in the petit jury box (Id., p. 413).

13. Petit jurors are drawn as needed in groups or panels of 44 persons each (Id., p. 413).

14. The names of such panels are given to the sheriff (Id., p. 413).

15. The sheriff summons all persons on the list whom he can find (Id., p. 413).

16. All summoned persons are required to report for jury duty (Id., p. 413).

It will be observed that, in the Brown case, it affirmatively appeared that there was no improper handling of tickets because:

1. The names of all property owners were placed in the jury box on identical tickets or pieces of paper.

2. The various drawings from the box were made by a

child and in the presence of either the public, the county commissioners, or the Superior Court judge.

3. There was no indication of the race of the individual jurors on the list of names of persons to be summoned which was given to the deputies.

4. The non-existence of fraud in the selection procedure was admitted as a matter of fact.

5. The proportion of Negroes on the grand and traverse juries finally selected was substantially the same as that on the original source of jurors, to-wit, the tax lists.

Accordingly, in the Brown case, the Court was reduced to the proposition of whether the use of tax books as an exclusive source of jurors was, per se, an unconstitutional discrimination against the Negro race, and

Whether the existing statutes with reference to jury selection effected such discrimination by their terms.

B. Speller case

The Speller case does not go into nearly as much detail as the Brown case, probably, mainly because many of the same facts as to procedure apply to both. However, we definitely find the following facts:

1. The clerk selected names for the jury box from the persons who had "the most property" whose names appeared on the tax digest. He testified that no racial discrimination entered into his selection (Id., p. 419).

2. The venire was drawn from this box by a child, aged five, in the presence of the defendant and his counsel (Id., p. 419).

3. All the names drawn were given to the sheriff and summons issued (Id., p. 419).

(C) This case

The facts of this case are set out in the original petition for certiorari and the brief and record in support thereof,

and will be analyzed further in the summary of this section of this brief (Subdivision VII).

(e) Identification of Negroes as such during selection procedure

This problem did not arise in the Brown case. In the Speller case (Id., p. 417), defendant assigned error on the ground that the Court refused to permit him to produce evidence that dots were placed by the names of Negroes on scrolls (tickets) in the jury box, on the ground of immateriality. The Court, pointing out, as above shown, that the jury had been drawn fairly notwithstanding this practice, held that the practice could not have harmed the defendant and that the fact that such identification of Negroes had been made by some unknown person (which would have been held unlawful had it been followed by actual discrimination) would not, in itself, constitute a denial of due process, if the remaining facts of the case negatived discrimination.

It is this precise point that defendant pointed out in his petition for certiorari and main brief in support thereof, pages 21, 22, wherein he said:

> "Defendant acknowledges that, had this method of printing tickets been used, and had a substantially similar proportion of Negro persons been found at all places from the Tax Receiver's digest to the final jury panel, the color of the tickets upon which the respective names were printed would be immaterial, but such is not the case."

Undoubtedly if, in the Speller case, the presence of the dots had been followed up by evidence of exclusion, the ruling would have been different.

There was no explanation of the practice in our case except

(1) custom, and
(2) facilitating location of jurors (R. 15).

Custom, to say the least, is not an argument in support of the constitutionality of the practice, but is, rather, evidence of habitual discrimination over 50 years which continued and infested the procedure of selecting the jurors who tried James Avery, the defendant in this case.

The purported facilitation of location of jurors by the sheriff was proved to be a subterfuge for discrimination when it was shown that the sheriff never looked at the yellow tickets in an official capacity but only upon the names of the jurors finally chosen which had been drawn from the box and written on a separate list, both Negro and White being written on paper of the same color (R. 24).

VIII. Summary

The reason afforded for the reduction in the percentage of Negroes between the tax digest and the jury box in the Speller case, to-wit, that selection was made from those with the most property (Id., p. 419), was, to say the least, logical and explainable on a basis other than that of discrimination, and was tolerated although there was an apparent implication in the language "economic basis not attacked here" (Id., p. 420) that it did not receive full sanction and was tolerated only because no proper attack was made upon it. Had attack been made upon the ground that the adoption of the ownership of the greatest amount of property as the standard of jury selection was, in itself, a discrimination on account of race, and that said standard was adopted in order to afford a colorable veil over the basic scheme to deprive the Negro of indiscriminate representation on jury lists and to deprive the Negro defendant of the right to have an indiscriminate selection of jurors of both White and Negro races to try his case, the decision might well have been different.

In the case at bar, not even a colorable excuse is afforded

for the drastic reduction in the percentage of Negro persons from the tax list to the percentage on the jury list.

Also, the basic practice complained of in this case (to-wit, improper selection *after* the jury list was made from the tax digest) was not involved in the Brown and Speller cases.

The only ground of attack, therefore, in the Speller case, was the practice by which the juries were selected by the commissioners. That is not true in the case at bar.

Likewise, it should be remembered that the following additional distinctions exist:

Brown case	This (Avery) case
1. The jury list was selected by lot from the tax digest by a child.	1. The jury list was selected by a discretionary use of judgment by the commissioners.
2. The names of the jurors so selected were printed on identical tickets.	2. The names of the jurors so selected were printed on tickets of different colors at the specific instruction of the Clerk of the Jury Commission.
3. A child draws the individual jurors for service at any given time.	3. The judge draws the names of such individual jurors and a deputy sheriff "arranges" them and a typist types them (page 14 of original petition for certiorari and main brief in support thereof).
4. There was nothing on the list of jurors given to the sheriff to be summoned that indicated whether the person to be summoned was White or Negro.	4. The list of jurors given the sheriff to be summoned disclosed whether the individual was White or Negro.

Each of these distinctions is an open avenue to fraud in the (Avery) case at bar that does not exist in the Brown case. We urge again, in the light of the comparison of the results and of the procedures, the affirmance in one is not a precedent for affirmance in the other. The principles governing both are the same; the factual situations are not.

In the Brown case, the percentage of Negroes called in each successive stage was almost in the precise proportion to that on the original jury list (part (c) of this subdivision VII of this brief). In the case at bar, the proportion was reduced to zero (petition for certiorari and main brief in support thereof, p. 2).

Again, as to the case at bar, the attention of the Court is invited to the possibility of discrimination by grouping or "arranging" as shown in pages 32 and 33 of petition for certiorari and main brief in support thereof.

We conclude: when there has been a consistent practice that facilitates discrimination and also facts consistently indicating that discrimination has existed and does exst, the practice itself should be declared unlawful. If an improper method (a method facilitating, though not necessarily effecting, discrimination) is properly applied (i. e., applied in such a manner that discrimination affirmatively does not result), obviously, the defendant can have no redress from this Court. However, if such method is improperly applied (i. e., applied in such a manner that it can not be affirmatively said that discrimination does not result) both the method and its application are subject to excision by this Court, and, a fortiori, this is true in cases such as this, where the improper result is visibly manifest.

Section III. Rebuttal to Brief of State of Georgia

It is significant to note that the State of Georgia, in its brief in opposition to grant of certiorari in this case (there

entitled "No. 102 Misc."), relied on no authority of the Supreme Court of the United States. True, appeal (treated as petition for certiorari) was denied by this Court to the Supreme Court of North Carolina in *Wells* v. *State of North Carolina*, 320 U. S. 635, 58 S. Ct. 18. As to this, was it not said (*Brown* v. *Allen*, supra, p. 407, and cit.):

> "the denial of certiorari 'imports no expression of opinion upon the merits of a case' ".

It is true that the question of racial discrimination was discussed by the Supreme Court of Georgia in *Herndon* v. *State*, 178 Ga. 832, 174 S. E. 597, rehearing denied 179 Ga. 597, 176 S. E. 620, but it was only discussed by that court as dictum, and not as a matter governing the opinion (see par. 1 of said opinion), and it was never raised at all before the Supreme Court of the United States, to which said case was brought by appeal, the question there being only on the issue of whether the Supreme Court of the United States should consider the question of whether the substantive construction by the Supreme Court of Georgia of the statute under which the defendant was convicted rendered the statute unconstitutional (*Herndon* v. *State of Georgia*, 295 U.S. 441, 55 S. Ct. 794).

The State of Georgia also relied on the statement of Judge Cardozo in the case of *Coler* v. *Corn Exchange Bank*, 250 N.Y. 136, 164, N. E. 882, as to judicial sanction being given a practice because it has been followed, by "common consent", for a long period of time, as giving sanction to the practice complained of in the case at bar. On the contrary, in the various cases cited by petitioner in his petition for certiorari and main brief in support thereof, it is the very consistency with which the practices complained of have been followed over the years that has constituted the conclusive evidentiary fact resulting in the reversal

of the convictions on the grounds of denial of due process and equal protection.

In response to the contentions under parts 2 and 3 of respondent's said brief, petitioner has never contended that the burden of proof was otherwise than upon him, and respectfully re-invites the attention of the Court that, in all cases where reversals have been rendered in this Court on the grounds of discrimination in jury selection, the mathematical result of the selective process has been the vital factor considered by the Court. Indeed, as pointed out on page 20 of petition for certiorari and main brief in support thereof, our basic contention is that, in the light of the admitted practice as to the use of the tickets of different colors, the final result

> "cannot be sensibly explained by mathematical formulae or coincidence in the absence of discrimination".

Conclusion

It is respectfully submitted that, for all the reasons heretofore stated, conviction should be reversed.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1952

NO. ~~182 MISC.~~ 648

JAMES AVERY, Petitioner

vs.

STATE OF GEORGIA, Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Georgia

BRIEF FOR RESPONDENT IN OPPOSITION

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In the

Supreme Court of the United States

October Term, 1952

NO. 102 MISC.

JAMES AVERY, Petitioner

vs.

STATE OF GEORGIA, Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

BRIEF FOR RESPONDENT IN OPPOSITION

I.

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 209 Ga. 116, 70 S.E. 2d 716.

II.

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioner's brief at page 1.

III.

QUESTION PRESENTED

Whether or not a member of the Negro race in the selection of a jury before whom he is tried has been denied due process of law and equal protection of the law so as to invalidate his conviction where the jury

commissioners of Fulton County, Georgia, as one of their official procedural steps in making up a petit jury, have printed the names of White jurors on white slips of paper and the names of Negro jurors on yellow slips of paper—all of which are placed in a box from which a jury is drawn. This procedure has been followed in Fulton County for more than fifty years. More specifically the questions are:

1. Is the practice, inherently and without other facts, violative of petitioner's rights under the Fourteenth Amendment?

2. Is the practice, under the facts in this record, violative of petitioner's rights under the Fourteenth Amendment?

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of law are set forth in petitioner's brief, pp. 2-7.

V.

STATEMENT

The petitioner was indicted for rape of a white woman in the Superior Court of Walker County, Georgia. Petitioner's motion for change of venue was granted, and he was tried and convicted in the Superior Court of Fulton County, Georgia. Throughout this brief the petitioner is referred to as the accused in the trial below.

On arraignment, counsel for accused filed a written challenge to the array of traverse jurors put upon him, alleging that, in making up the jury box, the

jury commissioners had placed the names of White and Negro jurors on slips of paper of different colors, the names of the White jurors being placed therein on white slips and the names of Negro jurors being placed therein on yellow slips.

This procedure of placing in the jury box the names of White jurors on white tickets and the names of Negro jurors on yellow tickets has been carried on in Fulton County, Georgia, for fifty years or longer.

In the selection of the traverse jurors put upon accused, no influence was exercised, no devise was used, no precaution was taken and no purposeful plan was resorted to in an effort to exclude negroes, according to the uncontradicted testimony of the judge who made the selection.

From the evidence it is apparent that in Georgia valid reasons exist for the procedure of placing in the jury box the names of White jurors on white tickets and the names of Negro jurors on yellow tickets:

(1) It makes readily available information which will aid the sheriff in locating and summoning individual jurors;

(2) It makes readily available information which will aid the jury commissioners in checking names in the jury box against the tax digest, in which the names of Whites and Negroes are required by statute to be listed separately, and from which the jury commissioners are required by statute to select the names placed in the jury box; and

(3) It enables the trial judge readily to determine from an inspection of the jury box itself whether or not the jury commissioners have included therein the names of both White and Negro traverse jurors.

Nevertheless, the Supreme Court of Georgia in its decision of this case has expressed disapproval of this procedure and directed that it be discontinued, but ruled that in the present case accused suffered no harm from this procedure.

A full and complete statement of the facts is contained in the report of *Avery vs. State*, 209 Ga. 116, 70 S.E. 2d 716.

VI.

ARGUMENT AND CITATION OF AUTHORITY

It is contended by counsel for petitioner that this Court should grant certiorari and review and reverse this case because the procedure adopted in selecting the traverse jurors put upon accused "aids and facilitates the possibility of discrimination" in the selection of traverse jurors. Apparently counsel conclude that under the holdings of this Court the possibility of racial discrimination is equivalent to purposeful, systematic non-inclusion because of color. This conclusion is a nonsequitur.

1. Certiorari denied in other like cases.

While respondent is aware of what this Court has said is the effect of denial of certiorari, respondent feels compelled to illustrate the action taken by this Court in identical situations.

The case of *State v. Walls*, 211 N.C. 487, 191 S.E. 232; certiorari denied 302 U.S. 635, 58 S. Ct. 18, 82 L. Ed. 494; 1 A.L.R. 2d 1307, involved a factual situation almost identical with the case at bar. In North Carolina, as in Georgia, the commissioners select names to be placed in the jury box from the tax digest, Whites and Negroes being listed therein separately. On the scrolls used in selection of grand and

petit jurors the names of *Whites were written in black ink* and the names of *Negroes were written in red ink*. The clerk of the board of county commissioners testified: " . . . if the name comes out red or black it is put on the list. *The purpose in two different colors of ink is to see who to look for. It makes it easier to look for them.*" (Italics added.) This procedure was approved by the Supreme Court of North Carolina, and certiorari was denied by this Court.

The decision in the *Walls* case some years later was reaffirmed by the Supreme Court of North Carolina in *State v. Koritz*, 227 N.C. 552, 43 S.E. 2d 77.

In the *Koritz Case*, supra, accused complained of the selection of names to be placed in the jury box by "the use of separate tax lists for Whites and Negroes." The Supreme Court of North Carolina ruled (43 S.E. 2d 77, text 81): "It is the contention of the defendants, however, that our statutes on the subject contain inherent, constitutional infirmities, in that, the jury list is taken from the names of taxpayers of the county who are of good moral character and of sufficient intelligence. . . . The present case, in its factual situation, is strikingly similar to the one presented in the case of *State v. Walls*, supra, where a like ruling was upheld, and, on appeal to the Supreme Court of the United States, the decision was left undisturbed . . ." This Court denied certiorari in the Koritz Case, 332 U.S. 678, 68 S. Ct. 80, 92 L. Ed. 354.

Since the procedure used in the selection of the traverse jurors put upon accused in this case has been practiced unchallenged in Fulton County, Georgia, for fifty years or longer by common consent, this history is a strong ally of respondent in this case. As pointed out by then Chief Judge Cardozo in *Coler v. Corn Ex-*

change Bank, 250 N.Y. 136, 164 N.E. 882 (1928), affirmed 280 U.S. 218; 50 S.Ct. 94, 74 L.Ed. 378 (1930): " 'The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. *If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to effect it.*' (*Jackson v. Rosenbaum Co.*, 260 U.S. 22, 43 S. Ct. 9, 67 L. Ed. 107)." (Italics added.)

The case at bar is not a strong case against the procedure used in the selection of traverse jurors put upon accused. It is not contended on behalf of accused, except by innuendo, that accused has been actually and in fact discriminated against in this case. The Supreme Court of Georgia, as well as the trial judge, adjudicated that accused had not been discriminated against or harmed by the "mechanical compartment of the law" used in the selection of the traverse jury put upon accused. This adjudication is supported by the evidence adduced on that issue, which evidence indubitably establishes that a fair jury, selected without regard to race, under a conscientious procedure of selection, without any purposeful non-inclusion because of color, was put on accused. But counsel for accused baldly assert that the procedure of selection of traverse jurors put upon accused contains inherent constitutional infirmities and that, for such reason alone, this case should be reviewed and reversed by this Court, though accused was not in fact harmed and though such procedure affords a mere possibility of discrimination if the jury selection officials had been dishonest.

2. **Burden of proving discrimination is on Petitioner**

Equally untenable is the contention of counsel for

accused that in this case the burden is on the State to establish "as a *mathematical fact* that discrimination is not practiced" in the selection of traverse jurors. It would be as impossible to meet such a requirement as it would be to meet a requirement of proportional representation of the races on the jury list, because it would turn matters inherently incommensurable into mere matters of mathematics.

"Moral and reasonable certainty is all that can be expected in legal investigation . . ." Ga. Code, Sec. 30-105. "Absolute certainty of any fact is not to be attained in the trial of a case" *Bone v. State*, 102 Ga. 387, 390; 30 S.E. 845. "Moral and reasonable certainty is all that can be expected in legal investigations, mathematical certainty not being required . . ." *Daniel v. State*, 61 Ga. App. 663, 664 (1); 7 S.E. 2d 204.

As pointed out by Mr. Chief Justice Stacy in the Koritz Case, supra (43 S.E. 2d 77, text 81): "Hence, as local officials are in better position than outsiders to weight the imponderables, *their determination of the matter will be upheld unless too wide of the mark or 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process'.*" (Italics added.)

3. No proof of discrimination against petitioner

The jury selection plan of Fulton County, Georgia, is not ingenious, but is an ingenuous, fair and conscientious procedure of selection. The operation of this plan has not resulted in the exclusion of or discrimination against Negroes in respect to jury service, for Negroes serve frequently and regularly on both the grand jury and petit jury. Proportional representation of Negroes on the jury list, being an impossibility,

is not provided, but there is neither limitation nor non-inclusion because of color. Neither the jury selection plan itself nor the results from administrative practices of the jury selection officials are discriminatory per se. Therefore, the burden of proof to sustain the contention of discrimination or non-inclusion was on accused. In the case at bar the evidence adduced signally fails to sustain accused's contention of unlawful discrimination or purposeful non-inclusion in selection of traverse jury put upon him, and it also fails to overcome the legal presumption that the jury selection officials performed their duty fairly, without discrimination against or non-inclusion of Negroes. Cf. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597; app. dismd. 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794; 1 A.L.R. 2d 1294.

Mere absence of Negroes from the particular traverse jurors put upon accused is insufficient, in and of itself, to show discrimination or non-inclusion because of race. 1 A.L.R. 2d 1314, Sec. 10.

Mere suspicion or mistrust is insufficient, in and of itself, as proof of discriminatory practices in jury selection. The presumption in favor of the proper performance by the officers of their duty in selecting a fair and impartial jury cannot be overcome by figments of the imagination or conjecture.

4. No valid reason shown why a writ should issue.

The petitioner has failed to demonstrate any reason why the writ of certiorari should be granted in this case. In division D of his petition for the writ he fails to point out a single case which would illustrate that the Georgia Supreme Court in the instant case was not in accord with the applicable decisions of this Court, and the cases to which he refers without discussion

are inapproprite to the question here presented. Counsel for respondent can find no case where this Court has granted certiorari and reversed by reason of non-inclusion of members of the Negro race from the jury except upon a showing that the discrimination was actual, systematic, or complete exclusion. In other words, petitioner has not shown that the decision below is clearly in error or that it is in conflict with any applicable decision of this Court, or finally that a weighty Federal question of paramount importance is presented for decision.

VII.
CONCLUSION

For the foregoing reason it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1952

No. 648

JAMES AVERY,

Petitioner,

VS.

STATE OF GEORGIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Georgia

BRIEF FOR THE RESPONDENT

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No. 648

JAMES AVERY,
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On Writ of Certiorari to the Supreme Court of the State of Georgia

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Georgia (R. 45) is reported in 209 Ga. 116; 70 S.E. 2d 716.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under §1257 and §2101, Title 28 U.S.C.

STATUTES INVOLVED

The petitioner does not question the constitutionality of any statute, but contends that the action of officers under valid State statutes denied him a fair trial and denied him due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment.

STATEMENT

James A. Avery, the petitioner, was tried in the Superior Court of Fulton County, Georgia, found guilty of rape and sentenced to be electrocuted. The Supreme Court of Georgia affirmed this conviction. *Avery vs. State*, 209 Ga. 116, 70 S.E. 2d 716. Petitioner would have this Court reverse the judgment of the Supreme Court of Georgia solely because of alleged errors in its decision having to do with the procedure followed in the impaneling of the trial jury which returned the verdict of guilty. (Petition, p. 19).

The indictment in the case at bar was returned by the grand jury of Walker County, Georgia, to the Superior Court of that County. (R. 1). A change of venue was granted (*Avery v. State*, 83 Ga. App. 700, 64 S.E. 2d 589) to Fulton County where trial was had. At the time of trial the petitioner filed timely written challenge to the array of traverse jurors put upon him (R. 39). By this pleading numerous objections were made to the manner in which the jurors put upon him were selected and impaneled. Many of these objections are no longer in issue. The State demurred and moved to strike the challenge to the array (R. 10). This demurrer was sustained in part and Paragraphs 1 through 6 of the challenge accordingly stricken (R. 15). Paragraphs 7 through 11 inclusive of the challenge were deemed by the trial judge to state good grounds of challenge to the array of jurors and the demurrer as to those paragraphs was in consequence overruled (R. 13). The State then traversed the allegations of fact contained in the challenge to the array (R. 11) and the trial judge received evidence upon the issues of fact thus made. After receiving evidence, the challenge to the array was overruled by order (R. 91) which did not contain express findings upon

any of these issues of fact.

According to the evidence received upon this preliminary issue the panels of jurors tendered and challenged were selected from a jury list revised by the Jury Commissioners of Fulton County over a period of approximately eleven months from August, 1948 to July 25, 1949 (R. 26-27). In making this revision the Commissioners first had a group of clerical assistants to examine all original property tax returns which were obtained from the Tax Receiver's office in the form of bound volumes. For each such return a card was prepared containing the name and address of the taxpayer and other information deemed useful. (R. 21). There were 122,771 taxpayers making returns for which such cards were made. (R. 27). The Jury Commission studied each of these cards and, based upon the information which they contained, selected the names of certain taxpayers to be included in the traverse jury list. By statute County Tax Receivers in Georgia have, for more than fifty years, been required to make separate alphabetical lists of white and colored taxpayers. Ga. Code § 92-6307, (Appendix, p. 16). The printed forms on which tax returns are made are printed upon white and yellow paper and colored taxpayers make their returns upon those forms printed on yellow paper. The clerical employees of the Jury Commissioners obtained much of their data from these tax returns. (R. 21). George A. Campbell, who served as a member of the Board of Jury Commissioners for the period in question was presented as a witness by petitioner and in describing this procedure stated: (R. 15)

> "... we take the digest which is separate and has yellow sheets and make the cards for the

jury box in the same color as in the tax digest . . ."

After all of the cards had been examined and selection completed, those names selected to compose the jury list were transmitted to the printer, who set the list in type and returned page proofs to the Jury Commissioners. The page proofs were carefully checked and verified by the commissioners. From the corrected proof the printer printed four copies of the list of traverse jurors having the names thereon so arranged and so spaced that the list may be cut up into cards, each containing the name and address of a single juror. Three of the four printed lists were cut into such tickets and by the commissioners placed in the jury boxes for the Superior Court, the Civil Court of Fulton County and the Criminal Court of Fulton County. On all printed lists the names of all colored jurors were printed on yellow sheets of heavy paper stock. This was done at the instruction of the C. rk of the Superior Court who is Ex Officio Clerk of the Board of Jury Commissioners. (R. 23). Copy of the printed list is bound, certified, and filed in the office of the Clerk. (R. 22). It has been the practice in Fulton County to print the names of Negro jurors on yellow tickets and those of white jurors on white tickets for fifty years or more and no witness knew why that custom was started. (R. 14, 15, 30).

The procedure followed in drawing from the jury box the names of the jurors who were formed into the panels here challenged was described by Judge Virlyn Moore, Presiding Judge of the Superior Court of Fulton County, (R. 28-32), who was sworn as a witness on behalf of petitioner. The statutory plan for the selection of jurors, Ga. Code, Title 59, requires that a jury box be provided which contains two compartments

marked "one" and "two". The Jury Commissioners must place therein tickets containing the names of the jurors. Ga. Code, § 59-108, (Appendix, p. 14). When a jury is drawn by a Judge the seal on the jury box is broken and tickets are taken from the compartment numbered "one" and after being listed are deposited in compartment numbered "two". When all names have in this manner been drawn from compartment numbered "one", then the procedure is reversed. Ga. Code, § 59-230, Ga. Code § 59-701, (Appendix, p. 15). Judge Moore in substance testified that as the Judge in Chambers during the month of August, 1951, he drew the jury put upon the accused at his trial in September, 1951, which was the subject of this challenge to the array. (R. 28). It was his practice to reach down into the box and without choosing or selecting, pick up several tickets and deposit them in a cigar box numbered 1. After forty or fifty tickets have been placed by him in this cigar box, they are handed to a Deputy Sheriff, who in turn passes them to a Deputy Clerk for listing. When these names have been copied upon a list, they are deposited in a cigar box numbered 2 and thereby returned to the compartment of the jury box numbered "two". (R. 28-32). This witness stated:

> ". . . I didn't make any selection as to white and yellow slips. Absolutely none. I have never at any time in drawing a jury in this county made any selection as to whether they were white persons or colored persons that were in the box. I have been Judge of this court—on my 25th year now. I have petit jurors that are colored here in court. Sometimes we have an entire panel or more. I think it was five colored grand jurors last

> time here. It is common practice for both colored and white to serve on the jury. It certainly is, it occurs very often . . ." (R. 31).

The order entered by the trial judge at the conclusion of the evidence was:

> "Upon hearing the evidence offered in support of the within challenge to the array, it is ordered that said challenge to the array be and the same is hereby overruled." (R. 9).

SUMMARY OF ARGUMENT

Respondent contends that:

1. Petitioner's case must be restricted to questions presented as set out in his petition for certiorari.

2. The use of colored tickets does not, of itself, accomplish discrimination and is not calculated to accomplish universal discrimination against Negro litigants.

3. Petitioner cannot here complain of discriminatory practices which have not been presented to the trial court or to the Supreme Court of Georgia by pleading or proof.

4. A decision of the trial judge on issues of fact, fairly made and supported by substantial evidence, will be conclusive on appeal in the Supreme Court of Georgia and in this Court.

5. Proof fails to establish that petitioner has, in this case, been denied any constitutionally guaranteed right with respect to the jury put upon him.

ARGUMENT AND CITATION OF AUTHORITIES

The petition for certiorari contains no assignment of errors or specification of errors as such. In the

petition two questions are said to be presented. (Petition, p. 19. Brief in support of petition, p. 25-26). By the two questions thus stated, petitioner apparently limited his attack upon the jury selection procedure followed in the trial court to the method by which the panel of jurors were drawn from the jury box. Other grounds of objection have apparently been expressly abandoned. (Petition, p. 15). Since certiorari was granted upon this petition and since the case has been calendared for argument upon the summary docket, we will restrict our brief to an argument of the points thus made. We do this upon the assumption that both the petitioner and this Court deem those points important and controlling. We further understand the rule of this Court to be that "Only the questions specifically brought forward by the petition for writ of certiorari will be considered." U. S. Sup. Ct. Rule 38, 28 U.S.C.A.; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 357.

Petitioner's challenge to the array of jurors as filed in the trial court was authorized by Ga. Code § 59-803, (Appendix, p. 15). The Supreme Court of Georgia has clearly pointed out that, under that statute, the trial judge must determine all issues of fact made upon such a challenge. *Harris v. State*, 191 Ga. 243, 256. The Supreme Court of Georgia will not disturb the trial judge's determination of issues of fact when such determination is supported by evidence. *Wilson v. State*, 69 Ga. 224, 238. By the terms of Georgia's Constitution its Supreme Court is a court for the correction of errors of law only. Constitution of Georgia, 1945, Art. VI, § II, ¶ IV (Ga. Code Ann. § 2-3704). This constitutional provision denies to the Supreme Court of Georgia jurisdiction and power to correct errors of fact. *Merritt v. State*, 190 Ga. 81, 87; *Mills v. State*,

188 Ga. 616, 623; *Smithwick v. State*, 199 Ga. 292, 304. The trial judge's decision was tantamount to a finding of fact that no discrimination was accomplished against colored persons in the selection of a jury. We submit that this decision was amply supported by evidence and should not be disturbed. This we understand to be the rule established by this Court. *Thomas v. Texas*, 212 U. S. 278, 282. Also see, *Cassell v. Texas*, 339 U. S. 282, concurring opinion of Mr. Justice Frankfurter, at pages 291, 292.

We may lay to one side those cases in which no Negroes had served upon juries over a long period of time. (*Neal v. Delaware*, 103 U. S. 370; *Norris v. Alabama*, 294 U. S. 587; *Hollins v. Oklahoma*, 295 U. S. 394; *Hale v. Kentucky*, 303 U. S. 613; *Pierre v. Louisiana*, 306 U. S. 354; *Patton v. Mississippi*, 332 U. S. 463). The record here shows that Negroes frequently serve on both grand and petit juries. (R. 31).

Indeed, within the four corners of this record *it does not appear whether Negroes were on the panels put upon petitioner.*

We do not understand petitioner to contend that the Fourteenth Amendment accords him the right to have Negroes upon the jury which tries him or to have Negroes upon the panels put upon him so long as there has been a fair and legal selection. Indeed, he could not so contend under this Court's decisions in *Martin v. Texas*, 200 U. S. 316, 321; *Virginia v. Rives*, 100 U. S. 313, 323; and *Neal v. Delaware*, 103 U. S. 370, 394.

Petitioner pretends to see in the practice of using different colored tickets a system which can be utilized to discriminate against all Negro litigants. Petitioner appears to claim no discrimination aimed individually

at himself, but claims that he shares the discrimination leveled against all litigants of his race. (Petition, p. 15). Mr. Justice Candler of the Georgia Supreme Court (R. 52, bottom of page) expresses the view that proof of this practice without more establishes a prima facie case of discrimination sufficient to require a reversal. This view of the matter is apparently shared by all other Justices of that Court. Despite this unanimity we must respectfully state that we do not see how the practice could be so utilized to accomplish universal discrimination. If the purpose be to reduce the number of Negro jurors selected on every occasion when panels of jurors are drawn then it would be necessary to ignore another statute. Georgia Code § 59-203 (Appendix, p. 14) provides that in impaneling grand jurors the ". . . judges of the Superior Courts . . . shall cause to be drawn from compartment number 'one' . . . names to serve as grand jurors . . . and *when all names shall have been drawn out of compartment number 'one'* then the drawing shall commence from compartment number 'two'." (Emphasis supplied). Georgia Code § 59-701 (Appendix, p. 15) provides that petit jurors shall be drawn in the same manner. So long as these statutes are observed, the colored card device is not an instrument by which Negro litigants may all be discriminated against. If the practice of deliberate selection of white jurors only is followed, then ultimately only yellow colored tickets will remain in the compartment from which the jury panels are required to be drawn. If there has been violation of these statutes there is no proof of it in this record. It is a matter susceptible of inquiry and we submit that there should be no reversal here upon assumption without proof.

At page 2 of the petition for certiorari able counsel

for the petitioner has sought to show in tabular form what he fancies to be the progressive effect of systematic exclusion of colored persons from the jury. On the last line of this table it is represented that all of the jurors, sixty in number, comprising the panels from which the jury in this case was struck, were white persons. It is argued that this result could be achieved only by an unfair and discriminatory selection procedure.

Respondent respectfully submits that even if this table be factually correct, and the record is wholly silent as to the race of the jurors in the questioned panels, then it still falls short of demonstrating that discrimination which petitioner charges in his assignment of error. In the statement of the questions presented (R. 18-19) petitioner limits his case here to the complaint that jurors were drawn from a jury box containing the yellow and white tickets which have been described. We are left by this record wholly uninformed as to the racial proportion resulting from the drawing of these panels of jurors. We may not even determine with precision how many jurors were drawn. Judge Moore testified that it was customary to draw from one hundred fifty to two hundred jurors for each division of the Superior Court or a total of from three hundred to four hundred traverse jurors. (R. 28). He also testified:

> "I have petit jurors that are colored here in Court . . ."

If this Court concludes that the use of colored tickets resulted in the drawing of a disproportionate number of colored jurors it must of necessity do so in a factual vacuum.

The method of organizing jurors into panels of twelve is not prescribed by Georgia statute. We are

not enlightened as to the method followed here. From the nature of the task it cannot be done when the jurors are drawn from the jury box or until they are present in court and those who are to serve become known. Petitioner's argument at pages 32 and 33 of his brief in support of petition for certiorari, that the use of colored tickets facilitates an improper grouping of Negro jurors in panels fails for want of evidence that there was discrimination in this manner. The further argument that the five panels put upon petitioner were illegally chosen finds no evidentiary support nor was challenge made for this cause. We submit that without pleading and evidence no reversal can be had upon that ground. Furthermore, the point has not been decided by the highest court of Georgia empowered to decide it.

We come at last to a discussion of this Court's recent decision in *Speller v. Allen*, 73 S. Ct. 397, 419. Petitioner recognizes the weight of this decision against him and devotes his supplemental brief to an elaborate effort to distinguish that case from the case at bar. Respondent will make no effort to match this detailed effort at comparison. Respondent does, however, rely upon the principles announced in that case at page 419 of the report cited. Respondent contends that here, as there, the proof fell far short of establishing that purposeful non-inclusion of Negroes on account of race which has been so often condemned by this Court. Here, petitioner seeks reversal of the Supreme Court of Georgia's decision because the tickets of Negro jurors included in the jury box were upon yellow paper as distinguished from the white paper upon which the names of other jurors were printed. The clear and undisputed evidence showed that this visible difference was ignored when drawing names from the box. In the

Speller case, supra, the scrolls of Negroes identified by a dot or period were drawn from the box by a child deemed incapable of purposeful discrimination. We submit that no distinction can properly be made as between the drawing of jurors by a judge who refuses to discriminate and the drawing of such jurors by a child who does not know how to discriminate.

CONCLUSION

Based upon the foregoing argument and authorities we respectfully submit that the judgment of the Supreme Court of Georgia should be affirmed.

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APPENDIX

GA. CODE Sec. 59-101. *Jury commissioners; appointment; number; qualifications; terms; removal.*—There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor: Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners. (Acts 1878-9, p. 27; 1887, p. 52; 1901, p. 43; 1935, p. 151.)

GA. CODE Sec. 59-106. *Revision of jury lists. Selection of grand and traverse jurors.*—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be

drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead. (Acts 1878-9, pp. 27, 34; 1887, p. 31; 1892, p. 61; 1899, p. 44.)

GA. CODE Sec. 59-108. *Jury boxes, how made up.*—The jury commissioners shall place the tickets containing the names of grand jurors in a box to be provided at the public expense, which box shall contain compartments marked number "one" and "two", from which grand jurors shall be drawn, and the jury commissioners shall place the tickets containing the names of traverse jurors in a separate box, from which traverse jurors shall be drawn. (Acts 1878-9, pp. 27, 34.)

GA. CODE Sec. 59-203. *Manner of drawing.*—The judges of the superior courts, at the close of each term, in open court, shall unlock the box, and break the seal, and cause to be drawn from compartment number "one" not less than 18 nor more than 30 names to serve as grand jurors at the next term of the court; all of which names shall be deposited in compartment number "two"; and when all the names shall have been drawn out of compartment number "one", then the drawing shall commence from compartment number "two", and the tickets be returned to number "one", and so on alternately; and no name so deposited in the box shall, on any pretense whatever, be thrown out of it, or destroyed, except when it shall be satisfactorily shown to the judge that the juror is dead, removed out of the county, or otherwise disqualified by law. (Acts 1869, p. 140; 1874, p. 20.)

GA. CODE Sec. 59-701. *How drawn and summoned.*—Petit juries shall be selected, and their names placed in a box, as provided in sections 59-106 and 59-108. At the same time, and in the same manner, that grand juries are drawn, the judge of the ~~superior~~ court shall draw out of the same compartment of the jury box 36 names to serve as petit jurors for the trial of civil and criminal cases; and such petit jurors shall be summoned in the same manner as is provided in section 59-206 for summoning grand jurors. (Acts 1869, pp. 139, 140; 1878-9, p. 27.)

GA. CODE Sec 59-801. *Panel of ~~48 jurors in~~ felony trials; tales jurors.*—When any person shall stand indicted for a felony, the court shall have impaneled 48 jurors, 24 of whom shall be taken from the two panels of petit jurors, from which to select the jury. When the regular panels of petit jurors, or either of them, cannot be furnished to make up panels of 48 for the trial of felonies, because of the absence of any of such panels, where they, or any part of them, are engaged in the consideration of a case the presiding judge shall cause said panels to be filled by summoning such numbers of persons, who are competent jurors, as may be necessary to make full the said panels. If the jury shall not be made up from said panel of 48, the court shall continue to furnish panels, consisting of such number of jurors as the court, in its discretion, may think proper, until a jury shall be obtained. In making up said panel of 48 jurors, or successive panels of any number, the presiding judge shall draw the tales jurors from the jury boxes of the county and order the sheriff to summon them. (Acts 1937, pp. 466, 468.)

GA. CODE Sec. 59-803. *Challenge to the array.*—The accused may, in writing, challenge the array for

any cause going to show that it was not fairly or properly impaneled, or ought not to be put upon him; the sufficiency of which challenge the court shall determine at once. If sustained, a new panel shall be ordered; if not sustained, the selection of jurors shall proceed. (Acts 1855-6, p. 230.)

GA. CODE Sec. 92-6307. *Entry on digest of names of colored persons.*—The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order. Names of colored and white taxpayers shall be made out separately on the tax digest. (Acts 1894, p. 31.)

GA. CODE Sec. 92-6308. *Returns by receivers and collectors of taxes paid by colored people.*—The several receivers of tax returns and tax collectors in this State, or other officers performing similar duties, shall make a report to the Comptroller General of the character and amount of all taxes returned or paid by colored taxpayers in this State, and the Comptroller General in his annual report shall make a general exhibit of the character and amount of the taxes so returned. (Acts 1874, p. 109.)